Buffalo Human Rights Law Review

Volume 26 Article 6

1-1-2020

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ABSTRACT

This article explores the challenge which free speech poses to Israeli immigration policy. It does so, first, by looking into the American immigration policy regarding ideological exclusions, i.e. refusing entry of a foreigner to the U.S., or the deportation of one from it, solely due to the foreigner's ideological belief. As discussed in this article, the U.S. Supreme Court has been consistently reluctant to strike down laws and regulations barring entry of foreigners due to their ideological convictions, from the beginning of the previous century, throughout the Cold-War era, and up until the recent upholding of President Trump's travel ban. The article then turns to suggest that this doctrine of ideological exclusion is evolving in Israeli immigration policy and law too, and discusses the possible lessons that Israel could learn from the American experience in the field. Three Israeli case studies from the last decade are presented and analyzed: the deportation of a Messianic Jew; the Israeli-Palestinian Bereaved Families for Peace conference; and a recent amendment of the Entry into Israel Law allowing for the exclusion of activists who support boycotting Israel or its settlements in the occupied Palestinian territories. The analysis of the aforementioned cases is conducted along two axes. One is the location of

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the foreigner, which leads to the suggestion that foreigners already inside the country are independently entitled to the protection of freedom of speech prescribed by international human rights law and by Israeli Constitutional Law, yet are not necessarily entitled to extend their visa just by invoking their right to free speech. The second axis is the Israeli citizens' and citizenry's right to freedom of speech, which encompasses the right to listen, obtain information and engage in dialogue (with a foreigner). This analysis leads to the conclusion that although foreigners do not have a right to enter Israel based on their own right to freedom of speech, the citizenry has a right that the state will not prevent the admission of foreigners solely for their ideological belief.

INTRODUCTION

A traditional view — explicitly pronounced in Anglo-American legal precedents from the late nineteenth century,[1] is that a state is permitted to exclude foreigners, for any reason whatsoever, either by not allowing them to enter its territory to begin with or by deporting them upon entry. Let's call this traditional principle "the state's exclusion prerogative" (hereinafter, SEP). A further traditional understanding is that SEP emanates from sovereignty. Just as a sovereign state, by virtue of its sovereignty, is entitled to resist foreign armies from invading its territory, so — holds the traditional view — it is entitled to keep out citizens of foreign states.[2] Hence, SEP is perceived as extra-constitutional, in a sense that a state may invoke it whether or not it is explicitly acknowledged by its constitution.[3]

Even though this traditional view of SEP is generally held by most national courts, international bodies and legal scholars,[4] its rationale seems not to be sharpened enough.[5] Its outlines are not entirely clear, and its absolutism has been increasingly eroded throughout the end of the twentieth

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1. *See, e.g.*, *Musgrove v. Chan Teeong Toy,* 1891 A.C. 272 (1891) (in the U.K); *Chae Chang Ping v. United States*, 130 U.S. 581 (1889) (The Chinese Exclusion Case, in the U.S). For a similar view in Israel, *see* HCJ 582/71 *Clark v. Minister of Interior*, 27(1) PD 113, 116-18 (1972).

2. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) 83.

3. Louis Henkin, *The Constitutional and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 857 (1987).

4. For a legal scholar challenging the cornerstones of this view, *see* James A. R. Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804 (1983).

5. *See, e.g.*, Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetra*, 68 FORDHAM L. REV. 1 (1999).

century, and the beginning of the current one.[6] Nowadays, courts and scholars alike normally refrain from labeling SEP as an unqualified state power and will generally add a bracketed "almost" before this label. They might talk of a "broad" (even "very broad") discretion of the Executive in matters of immigration, but will stop short of the "absolute." Moreover, an understanding has emerged, the fact that SEP is extra-constitutional does not entail that it is immune from constitutional constraints, or judicial review.[7] The current legal perception is that domestic (constitutional) law, as well as international law can circumscribe the principle of sovereignty, and consequently of SEP. National courts can (and regularly do) review decisions not to allow foreigners in, and — more so — to refrain from their deportation, based on an array of legal norms.

In this article I will focus on a particular kind of encroachment on SEP, one which emanates from the right to freedom of speech. Moreover, while I will explore both the foreigner's and the citizen's right to freedom of speech — and the way in which their correlative and corresponding rights might, at times, influence the foreigner's right to enter a foreign country or to continue staying in it — my attention would be mainly on the *citizen*'s, rather than the foreigner's right. In other words, while not overlooking the foreigner's own right to free speech (or — at times — lack thereof, as discussed below), I will focus on the citizen's (or the citizenry's) right to listen to and exchange ideas with a foreign national in the citizen's own country, as part of the citizen's right to freedom of speech, and a state's correlative duty to admit the foreigner into its territory or not to deport her, as part of its duty to protect its *citizens'* constitutional rights, who might wish to converse.

While the notion of ideological exclusion of foreigners has been straightforwardly practiced in the United States for decades, with its peak during the Cold War period, when Congress passed the McCarran-Walter Act,[8] it took Israel longer to employ a similar measure by an act of the Knesset. Only in 2017 did the Israeli Knesset amend the law to enable the exclusion of foreigners, who call for the boycott of Israel (this amendment will be discussed in detail in Part III(C) below). However, as I will show in this article, anecdotal violations of the freedom of speech of foreigners took

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6. NEUMAN, *supra* note 2, at 121. *See also Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *State of Washington v. Trump*, 847 F.3d 1151 (2017) (United states case law); Immigration and Nationality Act, 8 U.S.C. 1152(a)(1) (banning discrimination in the issuance of immigrant visas on a variety of grounds).

7. Henkin, *supra* note 3, at 858.

8. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524 (1982)).

place in Israel before 2017 as well. In most of these cases, however, Israeli courts failed to realize the collateral effect of such violations on the freedom of speech of Israeli citizens, and furthermore, failed to rule that SEP should be restricted in order to prevent such collateral effect.

This disregard is surprising, since the idea that a constitutional right of a citizen could result in a curtailment of SEP is well recognized in Israel in other contexts, such as bi-national partnerships and marriages. The Supreme Court of Israel ruled that the constitutional right to family life derives from the right to human dignity (which, in turn, is enumerated in Basic Law: Human Dignity and Liberty).[9] It further ruled that an Israeli citizen is, in principle, entitled to exercise that right with his or her foreign partner *in Israel*.[10] To that end, the Court has repeatedly ruled, the Ministry of Interior must admit the foreign partner into the country, and refrain from deporting him or her as long as the relationship with the Israeli citizen sincerely remains, absent overriding serious concerns, e.g. threat to public safety.[11]

The notion that a foreigner may gain a permit to enter and sojourn in Israel by "piggybacking" on an Israeli citizen's constitutional right is, therefore, well familiar to Israeli jurists and courts. A similar analysis, I argue, applies when freedom of speech (rather than the right to family life) is at stake.[12] As a matter of fact, the Israeli Supreme Court *has* recognized such a possibility some decade and a half ago, in the matter of *Levy v. Manager of Industry and Services Department for Foreign Workers' Permits*.[13] Unfortunately, however, the Court's reference to the possibility that a foreigner

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9. HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel and other v. Minister of Interior and others*, 61(2) PD 202 (2006)(for English translation: http://elyon1.court.gov.il/Files_ENG%5C03%5C520%5C070%5Ca47/03070520.a47.htm).

10. *Id.* majority opinion of Judges Barak, Beinisch, Joubran, Hayut, Procaccia, Adiel, Rivlin and Levy.

11. *See, e.g.*, HCJ 3648/97 *Stamka v. Minister of Interior*, 53(2) PD 728 (1998); AdminA 4614/05 *State of Israel v. Oren*, 61(1) PD 211 (2006).

12. True, in denying a request for family reunification, the person who's right was infringed is identified, while in the case of an ideological exclusion, the right that was infringed is the public's right to know, and not necessarily of a distinct citizen. In Israel, the public's right to know was recognized in HCJ 243/62 *Israel Movie Studios Ltd. v. Greg*, 16 PD 2407, 2414-15 (1962). In addition, while in many cases rights that belong to the public (such as security), are used to trump individual rights, this is the opposite case. Meaning, the public's right to know is in line with the individual's right to freedom of speech. For a discussion regarding how the public's right to security might infringe on an individual's right to liberty, *see* CrimaA 2316/95 *Ganimat v. State of Israel*, 49(3) PD 365 (1995) (holding that a felony which is a "national calamity" cannot, in itself, suffice for remanding without bail).

13. HCJ 9723/01 *Levy v. Manager of Industry and Services Department for Foreign Workers' Permits*, 57(2) PD 87 (2003).

would enter Israel by "piggybacking" on citizens' free speech rights was an *obiter dictum* in *Levy*, and was perfunctorily mentioned in the case, without much elaboration. The *Levy obiter* was never referred to by a subsequent court decision, and the notion that an alien might be allowed entry into the country due to free speech concerns was neglected.[14]

The petitioner in *Levy* was the business manager of a group of Brazilian female dancers, who performed throughout Israel. The Ministry of Interior (MOI) rejected his application for renewal of the visas of four of the dancers. The Ministry claimed that Levy should employ Israeli dancers instead. In his petition to the Court, Levy argued that MOI's refusal was unreasonable, as Israeli dancers could not perform the Brazilian folkloristic dancing. He further argued that the refusal would harm him financially and is a violation of his right to freedom of occupation.

The Court's starting point was the notion of SEP, but it then stated that SEP must be balanced against competing interests. One of these interests, the Court wrote, is freedom of occupation: "Migrant workers policy . . . . should take into account, among other considerations, the person's [the citizen's] freedom of occupation and the possible violation of this right when that person's occupation obligates employment of foreign workers, which cannot be substituted by local workers."[15]

A second competing interest, continued the Court, is "freedom of expression and the exposure to the culture of the world."[16] After underlining the importance of exposure to other cultures in fields such as art, science, academia, sports and light entertainment, the Court wrote the following:

> The aforementioned value of openness and exposure to the cultures of the world relates also to the individual's right to freedom of expression, which is one of the fundamental values in law. Freedom of expression is not only the freedom to express opinions, to write and to perform, but also to "watch and listen" . . . The right to "watch and listen" is granted to each person according to his own taste and inclination. The exercise of such right could justify under certain circumstances permitting foreigners to sojourn in Israel and to work in their unique fields [of occupation] . . . . This consideration should be

14. As will be discussed in Part III below, this notion was raised in the Supreme Court's decision in AdminA 7216/18 *Lara Alqasem v. Immigration and Population Authority*, para. 17 (Oct. 18, 2018), Nevo Legal Database (by subscription, in Hebrew). However, as I will argue there, the Court failed to discuss this idea in depth in the *Alqasem* case as well.

15. *Levy, supra* note 13 at 92.

16. *Id.* at 94.

> included among the agency's considerations when it comes to set criteria for the sojourn of foreigners within different time boundaries.[17]

As mentioned above, the "piggybacking" *obiter* in *Levy* was never cited by subsequent court decisions, not even in the cases discussed at length in Part III, which revolved around restricting (potential) citizen-foreigner dialogue. Moreover, Israeli courts have so far overlooked the American legislation, mainly from the Cold War era, which sanctioned the exclusion of foreigners based on their political ideology, the judicial review of it — which dealt also with the "piggyback" argument — and the critical review of it by American legal academia. This disregard to American jurisprudence on the matter is surprising, as Israeli courts frequently refer to American precedents, particularly in the area of free speech.[18] I purport to rectify this omission in this article, and to suggest a sound analysis of ideological bans on immigrants, which considers freedom of expression, building on the American experience.

Part I will introduce the concept of ideological exclusion by focusing on American case law relevant to the issue. At the end of Part I, I discuss possible implications of the American account for Israel, which experiences a surge in the number of cases of ideological exclusions. Part II deals with freedom of speech of citizens and aliens, along two axes. The first axis is the location of the alien (whether outside of the country and wishing to enter or inside the country and wishing to stay). The second axis is a citizen's vs. an alien's right to freedom of speech. The analysis suggests that an alien, who is under a state's jurisdiction, is entitled to the protection offered by the right to freedom of speech, alongside the citizens' correlative right. It further suggests that, while aliens do not have a right to enter a foreign country based on their own right to freedom of speech, the citizenry of that country has a right that the state will not prevent the admission of foreigners

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17. *Id.*

18. The most notable judgement is HCJ 73/53 *Kol Ha'am v. Minister of the Interior*, 7 PD 871 (1953), where Justice Agranat held that freedom of expression is recognized in Israel. Pnina Lahav claims that Justice Agranat was highly influenced by his American legal education and by a trip to the United States, made around the writing of the Judgement. Pnina Lahav, *Foundations of Rights Jurisprudence in Israel: Chief Justice Agrantat's Legacy*, 24 ISR. L. REV. 211, 247-51 (1990). For other free speech judgements referring to American jurisprudence see HCJ 399/85 *Kahane v. Broadcasting Authority Management Board*, 41(3) IsrSC 255 (1987); HCJ 153/83 *Levi v. Commander of the Southern District of the Israeli Police*, 38(2) PD 393 (1984) (for English translation: https://versa.cardozo.yu.edu/opinions/levi-v-commander-southern-district-israeli-police); HCJ 680/88 *Schnitzer v. The Chief Military Censor*, 42(4) PD 617 (1989) (for English translation: http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Schnitzer%20v.%20Chief%20Military%20Censor.pdf).

due to their ideological belief. Part III introduces and analyzes Israeli case law regarding ideological exclusions: The case of Barry Martin Lawrence Barnett, a Messianic Jew who was deported from Israel for protesting with other Messianic Jews; The Israeli-Palestinian Bereaved Families for Peace case, which dealt with the decision of the Minister of Defense to forbid the entry of Palestinians to Israel for the participation in an alternative Memorial Day ceremony; and the Anti-BDS legislation, which includes the 2011 Boycott Law, the 2017 Amendment to the Entry into Israel law, and the judicial review of their constitutionality. Thereafter, a Conclusion is offered.

I. Ideological exclusion in the United States and Its Lesson for Israel

No other democracy has engaged in explicit ideological exclusion of immigrants as the United States of America. As Israel seems to be following the same path, I find it useful to discuss in some detail the American background, nature, and evolvement of such bans throughout the years. After describing the American jurisprudence on this matter, I will present some insights, which are — I believe — applicable to Israel.

A. *The Early Days*

Ideological exclusions in the United States date back to the end of the Colonial Period, when colonies excluded immigrants on the basis of unorthodox religious beliefs.[19] In 1903, following the 1901 assassination of President William McKinley by an anarchist,[20] and a two decades long turmoil regarding the rise of Anarchism and Marxism in Europe,[21] the first legislation denying entrance to the United States on the basis of political belief and affiliation was enacted.[22] The Immigration Act of 1903 (hereinafter, the 1903 Act) allowed to exclude "anarchists, or persons who believe in

19. Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 Geo. Immigr. L.J. 1, 4-8 (1987). For a broad overview of ideological exclusions in the United States from the 17th century to the 20th century, *see id.* at 8-65.

20. Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 Am. Hist. Rev. 777, 780-81 (1955).

21. *See* Tilner, *supra* note 19, at 13-26 (describing the domestic economic difficulties at that time and how the rise of Marxism in Europe triggered anti-alienism and anti-radicalism in the United States).

22. Act of March 3, 1903, ch. 1012, 32 Stat. 1213. *See also* Tilner, *supra* note 19, at 30-31. In 1907, Congress reenacted the 1903 Act and continued the exclusion of Anarchists. *See* Tilner, *supra* note 19, at 36-39.

or advocate the overthrow by force or violence law, or the assassination of public officials" from entering the United States[23]

The 1903 Act was reviewed and upheld as constitutional by the Supreme Court of the United States, in the case of *United States ex rel. Turner v. Williams*.[24] Turner, a citizen of England, delivered a lecture in New York in which he declared himself to be an Anarchist.[25] He was subsequently put under immigration detention, and brought before a Board of Special Inquiry in the immigration station at Ellis Island, after a warrant signed by the Secretary of the Department of Commerce and Labor was issued against him.[26] Turner challenged the 1903 Act by claiming, among other things, that it contravenes the free speech clause of the First Amendment. The Court held that the 1903 Act is constitutional and upheld the proceedings against Turner.[27] "[A]s long as human governments endure," the Court wrote, "they cannot be denied the power of self-preservation, as that question is presented here."[28]

The Act of 1903 was repealed by the Act of 1917 (hereinafter, the 1917 Act),[29] at a time of heated political climate regarding the United States' imminent entry into World War I.[30] The 1917 Act retained the exclusion of anarchists, but also excluded aliens "who advocate or teach the unlawful destruction of property."[31] This provision was meant to exclude aliens supporting the Industrial Workers of the World. In 1918, soon after the Russian Revolution, Congress enacted the Passport Act of 1918, which prohibited aliens from entering the United States without a visa and documentation.[32] Later that year, The 1917 Act was amended and broadened, thus excluding also aliens who teach the assassination of public figures and the overthrow of government.[33]

World War II provided the momentum needed for the introduction of the Alien Registration Act of 1940, also known as the Smith Act.[34] The Smith Act amended the Passport Act of 1918, adding former belief in or advocacy of the proscribed doctrines (i.e. anarchism, overthrow of govern-

23. Act of March 3, 1903, ch. 1012, 32 Stat. 1213, 1214.
24. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).
25. *Id.* at. 280.
26. *Id.*
27. *Id.* at 291.
28. *Id.* at 295.
29. Act of Feb. 5, 1917, ch. 29, 39 Stat. 87.
30. Tilner, *supra* note 19, at 39-40.
31. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875-78.
32. Act of May 22, 1918, ch. 81, 40 Stat. 559.
33. Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 §1.
34. Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

ment, destruction of property and assassination of public figures) as well as former membership in organizations advocating said doctrines to the list of grounds for exclusions and deportations from the United States.

In the case of *Harisiades v. Shaughnessy*, the Supreme Court examined whether the United States may deport a resident alien, staying legally in the country, because of membership in the Communist Party which terminated before enactment of the Smith Act.[35] The appellants, three legal aliens that were to be deported, all residing in the U.S. for over three decades,[36] contended, among other things, that their deportations are prejudicial to the First Amendment. The majority opinion held, however, that the First Amendment does not prevent the deportation of the appellants, since the advocation for a change of government by force and violence, as a membership in the Communist party dictates, is not protected speech. While the outcome was harsh for the appellants-deportees, it should be noted that in its reasoning, the Court, for the first time, jettisoned its traditional view — dated from the *Chinese Exclusion Case*[37] — that immigration policy is totally immune from judicial review.[38]

B. *Exclusion under the McCarran-Walter Act (1952-1990)*

In 1952, following an overridden veto by President Truman,[39] and preceding the height of the Cold War, the Immigration and Nationality Act of

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35. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

36. Harisiades was a Greek national that lived in the United States for 36 years and was a married to an American citizen. Mascitti, an Italian national, lived in the United States for 32 years. Mrs. Coleman, a Russian native, was also married to an American citizen, and lived in the United States for 38 years. All were members of the Communist Party in their past.

37. *Chae Chang Ping v. United States*, 130 U.S. 581 (1889).

38. However, *see* Justice Frankfurter's concurring opinion: ". . .whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, *e.g., Kwock Jan Fat v. White,* 253 U. S. 454, and the requirement of Due Process may entail certain procedural observances. *E.g., Ng Fung Ho v. White,* 259 U. S. 276. But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay are for Congress exclusively to determine, even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace." *Harisiades*, supra note 35 at 597.

39. President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441 (June 25, 1952).

1952 (commonly known as "the McCarran-Walter Act") was enacted.[40] Section 1182(a)(27) authorized the consular officer and the Attorney General to exclude from entry to the United States aliens they had reason to believe are seeking entry " . . . . solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[41] Section 1182(a)(28) dealt with, in much detail, the exclusions of aliens who are affiliated with Anarchism and Communism. Finally, Section 1182(a)(29) banned the entry to the United States of aliens with respect to whom the consular officer or the Attorney General knows has reason to believe probably would, after entry, engage in activities that might undermine national security or overthrow the Government.[42] Unlike Section 1182(a)(27) and Section 1182(a)(29), Section 1182(a)(28) authorized the consular officer and the Attorney General to exercise discretion and to grant a waiver to an alien who is within any of the classes described, pursuant to a set of terms.[43] Most of the cases discussed below relate to this Section, which is the most problematic — from a First Amendment perspective — of the three.

In *Kleindienst v. Mandel*, the United States Supreme Court addressed the Attorney General's decision to exclude a Belgian citizen under Section 1182(a)(28) and not to issue a waiver.[44] This is the principal and most important decision concerning ideological exclusion of immigrants handed down by an American court, and possibly any court in the Western world, and will therefore be discussed in more detail.

Ernest E. Mandel was a journalist and a publicist who advocated for communism,[45] situated in Brussels. In 1969, he was invited to participate in a six-day long conference on Technology and Third World, at Stanford University, scheduled for October of that year.[46] He applied to the American Consulate in Brussels for a visa, and was informed that his application

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40. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524 (1982)).

41. 8 U.S.C. § 1182(a)(27). The language used in this section derived from the Act of June 20, 1941, ch. 209, 55 Stat. 252, which amended the Passport Act of 1918 and authorized the consular officers to refuse visas to any alien they knew or had reason to believe sought entry into the United States to engage in activities which will endanger the public safety. *See also* Tilner, *supra* note 19, at 54.

42. 8 U.S.C. § 1182(a)(29).

43. 8 U.S.C. § 1182(a)(28). The terms included involuntary membership, being 16 years of age, opposing public interest.

44. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

45. *See, e.g.*, ERNEST MANDEL, AN INTRODUCTION TO MARXIST ECONOMIC THEORY (1967).

46. *Kleindienst*, 408 U.S., at 757.

had been refused under Section 1182(a)(28), but that a request for a waiver has been forwarded to the Department of State in Washington, D.C. Later, the Department refused to issue a waiver because Mandel has violated the conditions and limitations attached to the visa issued to him in a previous visit to the United States, as he spoke at more universities than his visa application indicated, thus engaging in activities beyond the stated purposes of his trip.[47]

Mandel and the various university professors who invited him appealed this refusal, against the Attorney General and the Secretary of State. They asserted, among other things, that Section 1182(a)28 of the McCarren-Walter Act, preventing Mandel's entry to the United States, was unconstitutional as it stands in contravention of the First Amendment.[48] The District Court for the Eastern District of New York held that "[t]he concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views."[49] Thus, Section 1182(a)(28) is invalid and void in regarding to the exclusion of Mandel.[50]

The Attorney General and the Secretary of State appealed to the Supreme Court. Mandel agreed that he himself has no legal right to enter the United States, and the case dealt with "the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country."[51] The Court rejected the Government's argument that the exclusion of Mandel does not contravene the First Amendment and asserted that the First Amendment right of the American academics who invited him was indeed infringed.[52] The Court also rejected the Government's suggestion that because the appellees had access to Mandel's ideas through his books, speeches and other technological alternatives, the First Amendment is inapplicable, and refused to hold that the " . . . . existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."[53] Thereafter, the Court recognized that the power to exclude aliens

47. *Id.* at 758.

48. *Id.* at 760.

49. *Mandel v. Mitchell*, 325 F. Supp. 620, 632 (E.D. N.Y. 1971).

50. *Id.* at 634.

51. *Kleindienst*, 408 U.S., at 762.

52. *Id.* at 764-65.

53. *Id.* at 765-66. Scholars have also asserted that the fact that an alternative to an encounter exists is a defective rationale for its ban. James W. Mohr, *Opening the Floodgates to Dissident Aliens*, 6 Harv. C.R.-C.L. L. Rev. 141, 146-48 (1970) (claiming that

is inherent to the idea of the state's sovereignty and mentioned Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[54]

Justice Blackmun, delivering the majority opinion of the Court, held that when the Executive Branch provides "a facially legitimate and bona fide reason" for denying a visa under Section 1182(a)(28), "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests."[55] In doing so, the majority refused to apply the regular standard of review applicable in cases of ostensible free speech violation under American constitutional law, i.e. strict scrutiny, which requires the government to demonstrate that it is using the most narrowly tailored means to achieve a governmental interest that is *compelling* (rather than a merely legitimate interest). Regarding Mandel, the Court held that his previous visa violation was a facially legitimate and bona fide reason for refusing to waive the Section 1182(a)(28) ban.

Justice Douglas, dissenting, held that solely problems of national security or the import of drugs are in the interest of the Attorney General in this context. To his reading, Congress did not entrust the Attorney General with the discretion to discriminate among the ideological offerings of foreign lecturers.[56] Justice Marshall and Justice Brennan, dissenting as well, held that in addition to the appellees' (professors') interests, the Government has interfered with the public interest in the prevention of any stifling of political utterance.[57] Thus, the standard for refusing a waiver cannot be a "facially legitimate and bona fide reason," as "[m]erely 'legitimate' governmental interest cannot override constitutional rights."[58] Consequently, the standard for examining an exclusion of an alien based on her political views (which she wishes to share with American citizens) is whether it is necessary to protect a compelling governmental interest, such as threats to national security, public health needs and genuine requirements of law enforcement.[59]

"[t]he opportunity to confront ideas directly, to challenge and to ferret out details, is especially important to the academic and scientific communities and that the rationale "presupposes that the only ideas worth hearing are those which have been published.").

54. *Kleindienst*, 408 U.S., at 766 (Citing *Boutilier v. Immigration and Naturalization Service,* 387 U. S. 118, 123 (1967)).

55. *Id.* at 770.

56. *Id.* at 774.

57. *Id.* at 776.

58. *Id.* at 777.

59. *Id.* at 783-84.

In 1977, following the Helsinki Accords of 1975,[60] Congress enacted the McGovern Amendment to the McCarren-Walter Act.[61] The Amendment stipulated that the Secretary of State should recommend to the Attorney General that a wavier be granted to any alien who is a member or affiliate with a proscribed organization but otherwise admissible. The enactment of the Amendment led to waivers of a substantial number of aliens who could have been excluded under Section 1182(a)(28).[62] In 1987, Section 901 of the Foreign Relations Authorization Act was enacted and prohibited visa denials based on "beliefs, statements, or associations" which would be protected if engaged in by an American citizen in the United States.[63]

In 1989, in *American Arab Anti-Discrimination Com. v. Meese*,[64] the District Court of California held, while citing *Harisiades*, that foreign nationals legally staying in the U.S. (to be differentiated from immigrants wishing to enter the U.S. — such as Mandel at the time) are protected by the First Amendment even in the deportation setting, and that a regular First Amendment standard would be applied by the courts in reviewing their deportation orders. The plaintiffs, charged with being members of or affiliated with the Popular Front for the Liberation of Palestine (PFLP), who were issued deportation orders on such ground, challenged several Sections of the McCarran-Walter Act, dealing with exclusion of aliens already in the U.S., based on their ideology.[65] The District Court found the Sections to be unconstitutional as being in violation of the plaintiff's First Amendment.

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60. Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292, 1313-14 (1975). Under the Helsinki Accords, United States took an obligation to promote international freedom of information and movement. The Helsinki Accords lack the power of a treaty, and obligations under the agreement are not legally binding. For more information regarding the Helsinki Accords, *see* Carlos Ortiz Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 San Diego L. Rev 301 (1988).

61. Act of Aug. 17, 1977, Pub. L. 95-105, tit. I, § 112, 91 Stat. 844, 848 (codified as amended at 22 U.S.C. § 2691 (1982)).

62. Tilner, *supra* note 19, at 78. *See also Abourezk v. Reagan*, 785 F. 2d 1043, 1048-49 (D.C. Cir. 1986) (holding that the government can't avoid the McGovern amendment by denying visa application under Section (a)(27) on the basis of affiliation with a communist organization).

63. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901(a), 101 Stat. 1331, 1399-1401 (1987).

64. *American Arab Anti-Discrimination Com. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989).

65. 8 U.S. C. §§ 1251(a)(6)(D), (F)(iii), (G)(v), (H) (provisions which allowed for the deportation of aliens for advocating or teaching opposition to all organized government, the economic, international, and governmental doctrines of world communism, or

The judgment was overturned by the Court of Appeals due to lack of ripeness of the issues, and remanded to the District Court for further deliberation.[66] However, the matter became moot shortly thereafter. In 1990, after suspending the ideological exclusion provisions of the McCarran-Walter Act,[67] Congress repealed the Act permanently and enacted the Immigration Act of 1990, which offered a narrower basis for an exclusion based on ideological criteria.[68]

During its 38 years, the McCarran-Walter Act sanctioned the exclusion of assertive, knowledgeable, intelligent, inspiring and interesting people (at least in the eyes of some members of American society), such as Nobel prize-winning author Gabriel Garcia Marquez, playwright Dario Fo, actress Franca Rame, NATO Deputy Supreme Commander Nino Pasti, and Hortensia Allende, widow of former Chilean President Salvador Allende.[69] There were many others, not as famous as the previously mentioned ones. When the act was finally repealed, there seemed to be a consensus that it was a long overdue instrument, associated with the infamous McCarthy era.

However, there seems to be a crawling comeback of ideological, semi-ideological or quasi-ideological exclusion of foreigners in current American immigration law. Communism, which replaced anarchism, was soon replaced by terrorism as the top national security concern affecting immigrants.[70]

C. *9/11 and Its Aftermath*

Shortly after the horrific Al Qaeda attacks in the United States on September 11, 2001, and as a direct response thereof, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly referred to as "the PATRIOT Act." Currently, Section 411 of the PARTIOT Act authorizes the Government to exclude any alien who had used a "position of prominence within any country to endorse or espouse terrorist activity,"

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the establishment in the United States of a totalitarian dictatorship and being a member in organizations that in engage in such activities).

66. *American-Arab Anti-Discrimination Com. v. Thornburgh*, 940 F. 2d 445 (9th Cir. 1999).

67. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901(a), 101 Stat. 1331 (1987).

68. Immigration Act of 1990, Pub. L. No. 101-649 (1990). *See also* W. Aaron Vandiver, *Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion*, 55 EMORY L.J. 751, 759-60 (2006).

69. *See* John Shattuck, *Federal Restrictions on the Free Flow of Academic Information and Ideas*, 3 GOV'T INFO. Q. 5, 14-15 (1986).

70. Vandiver, *supra* note 68, at 761.

or to "persuade others to support terrorist activity or a terrorist organization."[71] Section 411 also broadens the definition of terrorist activity in the Immigration and Nationality Act to include any crime that involves the use of a "weapon or dangerous device (other than for mere personal monetary gain)."[72]

In addition, the REAL ID Act[73] eliminated the Secretary of State's need to substantiate that an alien's putative endorsement could undermine the United States' effort to combat terrorism.[74] It also further expanded the use of ideological criteria, as an alien does not have to be in a position of prominence, and merely has to espouse or endorse terrorist activity to be inadmissible.[75] It also modified the Immigration and Nationality Act to define "engaging in terrorist activity" broadly. The definition includes "solicit[ing] funds or other things of value for . . . . a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization."[76] The definition of "terrorist organization" was also broadened considerably. It includes "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)."[77] The said subclauses include committing, planning, soliciting funds for, soliciting individuals for, or providing material support for a terrorist activity.[78]

For example, in the case of *Khan v. Holder*,[79] the Court of Appeals for the Ninth Circuit affirmed a denial of asylum and withholding of removal due to the fact that Khan, a citizen of India, has been involved in the Kashmir independence movement and worked with the Jammu Kashmir Liberation Front ("JKLF"), a group dedicated to the establishment of an

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71. PATRIOT Act of 2001, § 411, amending 8 U.S.C. § 1182(a)(3)(B)(VI) (2005). *See also* Hasan Z. Mansori, *Manipulating Public Debate: Using the PATRIOT Act to Keep Out Foreign Scholars*, 20 ST. THOMAS L. REV 205 (2008).

72. PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2005). For example, Section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."

73. REAL ID Act of 2005, § 103(a), 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (2005).

74. PATRIOT Act of 2001, § 411, 8 U.S.C. § 1182(a)(3)(B)(VI) (2005).

75. REAL ID Act of 2005, § 103(a), 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (2005).

76. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc).

77. 8 U.S.C. § 1182(a)(3)(B)(vi).

78. 8 U.S.C. § 1182(a)(3)(B)(iv).

79. *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009).

independent Kashmir. In Khan's testimony, that was found credible by the lower instances, he asserted that he was affiliated with only the political wing of the JKLF, that his work was entirely nonviolent in nature, and that he had no knowledge of the activities of the military wing of the JKLF. Nevertheless, the Court of Appeals upheld the ruling that Khan was statutorily ineligible for asylum or withholding of removal under the REAL ID Act because he had engaged in a terrorist activity.[80]

D. *The Trump Bans and the Mandel Heritage*

Shortly after his inauguration, President Trump introduced Executive Order 13769, then Executive Order 13780, and finally Proclamation 9645, all dealing with the exclusion of aliens from countries with predominant Muslim population.[81] The constitutionality of all these measures was chal-

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80. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV).

81. The first Executive Order released by President Trump (Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) temporarily suspended entry into the United States of immigrants and nonimmigrants from countries referred to in Section 217(a)(12) of the Immigration and Nationality Act—i.e. Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen — altogether. In the Executive Order, the President "proclaim[ed] that the immigrant and nonimmigrant entry into the United States . . . . from [these] countries . . . . would be detrimental to the interests of the United States." *Id.* at § 3(c). *See* Amy L. Moore, *Even When You Win, You Lose: Executive Order 13769 & the Depressing State of Procedural Due Process in the Context of Immigration*, 26 WILLIAM & MARY BILL RTS. J. 65, 88-91 (2017). The Executive Order also suspended the United States Refugee Admissions Program for 120 days. Following an injunction upheld by the Ninth Circuit against the Executive Order (*Washington v. Trump* (Washington II), 847 F.3d 1151 (9th Cir. 2017)), President Trump issued a second temporary Executive Order, replacing the first one.

The second Executive Order (Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017)), subtitled "Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States," exempted lawful permanent residents, current visa-holders and took Iraq off the list of banned countries. In addition, a waiver program for refugees was instituted. Injunctions against the revised Executive Order were upheld by the Courts of Appeals of the Forth Circuit (*International Refugee Assistance Project v. Trump*, 857 F. 3d 554 (4th Cir. 2017)) and the Ninth Circuit (*Hawaii v. Trump*, 859 F. 3d 741 (9th Cir. 2017)), and the Supreme Court issued a stay of the injunctions (*Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080). The stay narrowed the scope of the injunctions and exempted from the revised Executive Order foreign nationals with a "bona fide relationship" with a U.S. person or entity in the United States.

Finally, in September 2017, President Trump announced Proclamation 9645 (Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24. 2017)). It suspends entry of immigrants and nonimmigrants from Chad, Iran, Libya, North Korea, Syria, and Yemen, and of immigrants from Somalia, and denies entry into the United Stated of certain officials of the government of Venezuela. The Ninth Circuit upheld an injunction against the

lenged before the federal court system, and analyzed in a number of preliminary yet lengthy decisions. All these decisions, including the one handed down by the Supreme Court, recognized the standing of American individuals and entities (such as State Universities) to bring action against the measures due to their allegation that the ban burdens their own constitutional rights.[82] At the time of the writing of this article, the Supreme Court handed down an elaborate decision reversing the lower courts' nationwide preliminary injunction against the Proclamation.[83] This decision, while remanding the case to the lower court to discuss the merits of the case, left little grounds to strike the Proclamation down.

The main argument against the two Executive Orders (currently not in force) and the Proclamation was that they are motivated by the desire to keep Muslims out of the United States, and therefore violate the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Government denied that religious-based considerations motivated any of these measures, and insisted that security-based reasons are the grounds for it.

As *Mandel* dealt with a First Amendment challenge to an immigration restriction, and since both free speech and freedom of religion are protected by the First Amendment, the *Trump v. Hawaii*[84] Court inevitably revisited the *Mandel* case. While Chief Justice Roberts, in his principal majority opinion, rejected Justice Sotomayor's view (in her principal dissent opinion), that *Mandel*'s narrow standard of review was inapplicable to the case,[85] he nevertheless agreed to slightly raise the standard of judicial re-

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Proclamation but narrowed its scope to give relief "only to those with a credible bona fide relationship with the United States." (*Hawaii v. Trump*, No. 17-17168 (9th Cir. 2017)).

82. *See, e.g.*, *Trump v. Hawaii*, 585 U.S. __, 30 (2018) (Chief Justice Roberts' majority opinion).

83. *Id.*

84. *Id.*

85. Justice Sotomayor argued that "there is a good reason to think" that *Mandel* was inapplicable to the case for a variety of reasons, discussed in footnote 5 of her opinion, among them that *Mandel* "involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility . . . . Here, by contrast, President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis. ." *Id.* at 14 (Justice Sotomayor, dissenting). Chief Justice Roberts rejected this view since "our opinions have reaffirmed and applied its [Mandel's] deferential standard of review across different contexts and constitutional claims." (*Id.* at 31).

view, based on the government's own acknowledgment, and "assuming" that such higher standard of review is the correct one:

> A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order . . . . For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes . . . . As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[86]

So, while Chief Justice Roberts rejected Justice Sotomayor's opinion, that the strict scrutiny test, normally applicable to cases involving First Amendment ostensible violation, is applicable to the case, he did — *de facto* and *arguendo*, at least — agree to raise the standard of review from a *Mandel*'s "facially legitimate and bona fide reason" low standard of review to a higher (yet not too high) "rational basis" standard of review. The main difference between these two standards is that, according to the latter, the Court would examine whether the reason that the government gives for its act is *actually* and not just *facially* legitimate, and furthermore, inquire whether a rational connection exists between that reason and the means used to attain it. Still, legitimacy — rather than a compelling governmental interest and proportionality *stricto sensu*[87] — is the normative criterion espoused in *Trump v. Hawaii* to override First Amendment concerns.[88]

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86. *Id.* at 32.

87. A proportionate balance between the social benefit embedded in the permissive goal and the harm caused to the constitutional right. *See*: Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS OF HUMAN RIGHTS 1, at 6 (2010).

88. However, Chief Justice Roberts insinuates that when the exclusion in not based on national security or foreign affairs considerations, he might be willing to espouse a standard of review more stringent than the "rational basis" one. See in his footnote 5: "The dissent finds 'perplexing' the application of rational basis review in this context . . . . But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the de novo "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. . . The dissent can cite no authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context."

E. *Insights for Israel*

This brief description of American law demonstrates that Israel is not the first democracy in the world to exclude aliens from its territory based on their ideological convictions. Still, such a policy is extraordinary, and other democracies generally refrained from espousing ideological exclusions of foreigners in their immigration laws (other than in cases involving clear security-based concerns).[89] Moreover, the American jurisprudence on ideological exclusion of foreigners, and the *Mandel* decision in particular, were criticized by numerous legal articles.[90] Judy Wurtzel,[91] for example, argued that the specific circumstances of *Mandel* (his previous visa abuses) prevented the Supreme Court from offering additional examples as to what will be considered a legitimate and bona fide reason for visa refusal.[92] As a result, lower courts[93] were able to interpret the standard as they deemed fit, usually in a broad manner. This led the *Mandel* standard to be toothless.

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89. *See, e.g.*, Immigration and Refugee Protection Act, S.C. 2001, c 27, art 77 (Can.) (allowing for the Canadian Minister of Citizenship and Immigration to sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security. On 1998, Syrian citizen Hassan Almrei applied for a visitor's visa. The Canadian Security Intelligence Service (CSIS) determined that "Almrei behaved in a clandestine manner and that he visited a number of Arab Afghans," thus labeled him as a threat to security and as a member of an Al Qaeda sleeper cell. Only eight years after his arrest, the security certificate against him was disposed. Sherene H. Razack, *"Your Client has a Profile:" Race and National Security in Canada After 9/11*, 40 STUD. L. POL. & SOC'Y 3, 23 (2007)); Immigration Rules, (2016), para. 322(5) (allows for the refusal of a request to enter to or to remain in the United Kingdom of an alien for, among other things, " . . . . character or associations or the fact that he represents a threat to national security." This Rule was labeled as an " . . . . immigration rule designed to tackle terrorism and those judged to be a threat to national security." Amelia Hill, *Government U-turn over Anti-Terror Provision Used to Expel Migrants*, THE GUARDIAN (June 1, 2018) (https://www.theguardian.com/uk-news/2018/may/29/government-review-anti-terror-law-section-322-5-migrant-deport).

90. *See, e.g.*, Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 936 (1987); Leonard David Egert, *Granting Foreigners Free Speech Rights: The End of Ideological Exclusions*, 8 CARDOZO ARTS & ENT. L.J. 721, 744-45 (1990); Mark W. Voigt, *Visa Denials on Ideological Grounds and the First Amendment Right to Receive Information: The Case for Stricter Judicial Scrutiny*, 17 CUMB. L. REV. 139 (1986).

91. Judy Wurtzel, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. REV. 149 (1987).

92. *Id.* at 163-64.

93. Wurtzel discussed the following cases: *Abourezk v. Reagan*, 592 F. Supp. 880 (D.D.C. 1984), vacated, 785 F.2d 1043 (D.C. Cir.), cert. granted, 107 S. Ct. 666 (1986); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525 (D. Mass. 1986), vacated as

Wurtzel further argued that the *Mandel* standard is simply wrong. She offered an interesting analogy between the right of a U.S. citizen to exchange ideas with a prisoner and the right of a U.S. citizen to exchange ideas with a foreigner.[94] In *Procunier v. Martinez*[95] (which, interestingly enough, was cited in agreement by the Israeli Supreme Court[96]), the American Supreme Court held that while prisoners enjoy a diminished protection under the First Amendment, the exchange of letters between prisoners and outsiders is entitled to full constitutional protection, as "the interests of both parties are inextricably meshed."[97] According to Wurtzel, this holding is relevant to ideological exclusions of foreigners (which — like prisoners — might enjoy limited First Amendment protection themselves), and corresponds with the dissenting opinions of Justice Marshall and Justice Brennan in *Mandel*, demanding a compelling government interest in order to justify curtailment of freedom of speech of the citizen who wishes to interact in a discussion with the foreigner.[98] Therefore, an exclusion of an alien by the government can be based on the content of his or her speech only if it could be established that the speech poses a clear and present danger to public security rather than that he or she merely advocates for a subversive doctrine or is affiliated with a disfavored organization.[99]

The academic criticism of the exclusionary provisions of the McCarran-Walter Act, expressed by Wurtzel and others, the discomfort expressed by some of the American judges reviewing it, and the final repeal of the Act, demonstrate that the legal trend is against such ideological exclusion of foreigners. True, following the horrible attacks of 9/11 the pendulum swung back in the U.S. towards ideological bans, with the PATRIOT Act and the REAL ID Act as described above. But it is still a far narrower exclusion than the bans which were part of the McCarran-Walter Act. President Trump's two Executive orders and finally Proclamation 9645, all dealing with the exclusion of aliens from countries with predominant Muslim population, were also justified by the government (whether truthfully or pretex-

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moot, No. 86-1371 (1st Cir. June 18, 1986); *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985); *NGO Comm. v. Haig*, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (LEXIS, Genfed library, Dist file) aff'd mem., 697 F.2d 294 (2d Cir. 1982); *ElWerfalli v. Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982). Wurtzel, *supra* note 91, at 164-71

94. Wurtzel, *supra* note 91, at 175-79.

95. *Procunier v. Martinez*, 416 US 396 (1974).

96. Pris. Pet. App. 4463/94 HCJ 4409/94 *Golan v. Israel Prison Authority*, PD 50(4) 136 (1996) (The Supreme Court of Israel cites *Martinez* and adopts its ruling on the diminished right of prisoners to freedom of speech).

97. *Martinez*, 416 US 409.

98. *Supra* note 44, at 777.

99. Wurtzel, *supra* note 91, at 193.

tually) — just like the PATRIOT Act and the REAL ID Act — on strict security concerns. These explanations were accepted by the Supreme Court, and stand at the basis of its refusal to issue a temporary injunction against the Proclamation.[100] In discussing the Trump Proclamation, the Court has also shown a willingness to jettison *Mandel*'s very narrow standard of review, even in matters involving national security and foreign affairs concerns, and a strong dissent, led by Justice Sotomayor, called for an even heightened standard of review, i.e. one conditioning ideological exclusion based on evidence of compelling governmental interests.

The Israeli Supreme Court, as I will discuss below, is still a novice in dealing with these intersections of free speech and immigration, and one could only hope that it will not revert to the unfortunate *Mandel* test, which is eroded even in the United States. It should be open to contemplate the opinions of the minority judges, not only the majority ones, both in *Mandel* and in *Trump v. Hawaii*.[101]

Furthermore, the American experience proves how easy and dangerous it is to disregard the constitutional rights of foreigners and the people who

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100. *See supra* text accompanying notes 81-88.

101. The Supreme Court of Israel ruled, that at least certain aspects freedom of speech – among them political speech – are covered by Basic Law: Human Dignity and Liberty (*See, e.g.*, HCJ 10203/03 *"Hamifkad Haleumi" Ltd. V. Attorney General*, 62(4) PD 200, 215-218 (2008); the *Avnery* case, supra note 137) ("basic laws" being part of Israeli unique and incomplete constitution; *See*: Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements*, 53 Am. J. Comp. L. 77 (2005)). Under Basic Law: Human Dignity and Liberty, a governmental act or a statute, which violates a right protected by the basic law, could survive judicial review only if the violation was done for a proper purpose, and – furthermore – was proportionate. The Supreme Court has recognized three subtests to examine the proportionality of the violation. "The first subtest is the rational connection test, which examines whether the legislation that violates the constitutional right is consistent with the purpose that it is intended to realize. The second subtest is the least harmful measure test. This test requires us to examine whether, of all the possible measures for realizing the purpose of the violating law, the measure that harms the protected constitutional right to the smallest possible degree was chosen. The third subtest is the test of proportionality in the narrow sense. This test requires the violation of the protected constitutional right to be reasonably commensurate with the social advantage that arises from the violation." (HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, 63(2) PD 545 (2009); for English translation: https://supreme.court.gov.il/sites/en/Pages/External.aspx/?&type=4). The "proper purpose" criterion seems similar to the *Mandelian* "legitimate reason" standard. The first subset of the proportionality criterion resembles the "rational basis" standard of the majority opinion in *Trump v. Hawaii*, and the third subtest of the proportionality criterion resembles the strict scrutiny standard advocated by the minority opinion s in *Mandel* and *Trump v. Hawaii*.

wish to interact with them. Constitutional rights are supposed to be solid, and to resist ephemeral political atmosphere and changing public opinion. Unfortunately, when it comes to foreigners (including, sometimes, ancestors of foreigners), American jurisprudence has known some horrific displays of inhumanity towards them, and the case of ideological exclusion of foreigners interweaves with this alarming past and present. The ideological exclusion Articles, which were part of McCarran-Walter Act, were enacted during the Cold War era, and as part of McCarthyism. They were rescinded — after much criticism — at the end of the Cold War, but since then new initiatives of a similar background are being introduced as black letter American law.

In *Trump v. Hawaii*, the Supreme Court, explicitly for the first time, overruled the infamous 1944 *Korematsu* decision,[102] which allowed for the internment of people of Japanese descent (including ones who were American citizens) during World War II in the name of national security. However, Justice Sotomayor, in her dissent, cautioned that by allowing the Trump Proclamation to remain intact "the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."[103] Israel should not blindly follow the American path of ideological exclusions. If anything, it should pay attention to the criticism of it from both within the U.S. and outside of it.

II. FREEDOM OF SPEECH OF CITIZENS AND ALIENS

My analysis of the three Israeli case studies discussed in Part III below will rely on two distinct, yet related, axes. One axis is the location of the foreigner: outside of the country (wishing to enter) or inside the country (wishing to stay). The second axis is the citizen's vs. the foreigner's right to freedom of speech (either as a speaker or as a listener).

The first axis is relevant, as countries around the world, including Israel, generally apply their laws, and bestow constitutional civil and political rights, on a territorial or jurisdictional basis. That is, on any person present within the geographical boundaries or jurisdiction of the state. Applying domestic laws to events occurring or persons outside of a state's territory or jurisdiction is the exception to the rule. Similarly, states generally apply their domestic laws — including basic civil and political human rights — on persons within the state's territory or jurisdiction, regardless of their civil status. This rule has exceptions,[104] but it is still the rule, at least

102. *Korematsu v. United States*, 323 U. S. 214 (1944).

103. *Trump v. Hawaii*, 585 U. S. 28 (2018) (Sonia Sotomayor J., Dissenting).

104. For example, according to international human rights law, the right to vote and be appointed to public office generally applies to citizens only, and not to foreign-

with regard to the most basic human rights, freedom of expression included.[105] Most domestic legal systems, as well as international human rights law, adhere to this principle of territoriality.

The 14th Amendment of the American Constitution, for example, explicitly provides that "[n]o State shall . . . . deny to any person within its jurisdiction the equal protection of the laws." Most other rights, under the American Bill of Rights, are also conferred to "persons" rather than "citizens." American courts were very clear in their differentiation between the bestowal of constitutional rights on foreigners who are present (whether legally or illegally) on American soil and the refusal to bestow such rights on foreigners who are subject to acts by American officials outside of American territory or jurisdiction.[106] For this very reason, the District Court ruled in the *American Arab Anti-Discrimination Com.* case mentioned above, that the ideological exclusion embedded in the McCarran-Walter Act was unconstitutional and void as far as it applies to foreigners within U.S. territory, but was valid insofar as foreigners abroad (wishing to enter the U.S.) were concerned.[107]

Similarly, in Israel, Basic Law: Human Dignity and Liberty bestows most of the constitutional rights it refers to (including the non-enumerated

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ers residing in the country (see, e.g., Article 25 to the ICCPR). The exact constitutional protection that a country offers foreigners within its territory changes from country to country. For the U.S., see the enlightening account by Linda Bosniak, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP ACCOUNT (2006) 49-69.

105. *Bridges v. California*, 314 U.S. 252 (1941); *Bridges v. Wixon*, 326 U.S. 135 (1945).

106. David Cole, Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?, 25 THOMAS JEFFERSON L. REV. 365 (2003). In his concurring opinion in Bridges v. Wixon, *ibid* at p. 161, Justice Murphy articulated this stand most clearly: "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But, once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons,' and guard against any encroachment on those rights by federal or state authority." The Supreme Court of the United States has recently reiterated this principle in *Agency for International Development v. Alliance for Open Society International, Inc.*, 591 U.S. __ (2020).

107. *American Arab Anti-Discrimination Com. v. Meese*, 714 F. Supp. 1060 (1989). *See supra* note 64. For a discussion on non-Americans' right to free speech under U.S. law, *see* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech under the First Amendment*, 57 B.C. L. REV. (2016).

freedom of speech[108]) on "persons" rather than citizens[109] or residents.[110] In *Kav LaOved v. Ministry of Interior*[111] Judge Procaccia ruled:

> The basic constitutional principles anchored in Basic Law: Human Dignity and Liberty are applicable to a foreign worker staying in Israel, and intend to protect his life, body, dignity, property, personal liberty, right to leave Israel, privacy and intimacy. At the center of Basic Law: Human Dignity and Liberty stands the human being.
>
> . . .
>
> The Basic Law applies, therefore, for its most part, on every person present in Israel, regardless of civil status, religion, activities, opinion etc.[112]

International human rights law (to be distinguished from other brunches of international law with universal application, such as international criminal law) follows the same legal line. True, the European Convention of Human Rights (1950) contains Article 16, which supposedly excludes aliens from freedom of speech protection.[113] This Article has been,

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108. *See, e.g.*, HCJ 4804/94 *Station Film Company v. Film and Play Review Board*, 50(5) IsrSC 661, 674-675 (1997) (holding that freedom of speech is a constitutional right, as it is a component of human dignity, protected by the Basic Law). *But See e.g.*, PPA 4463/94 *Golan v. Prisons Service* 50(4) PD 146, 190-192 (1996) (holding that while the freedom of speech is a basic right, and not only deduced from the right to dignity, since the right to freedom of speech is not listed in the Basic Law, only infringement of the right that also infringes the right to dignity is prohibited by the Basic Law)

109. Article 6(b) is the only article of the basic law that refers to "citizen" rather than "person"; it provides: "Every Israel citizen has the right of entry into Israel from abroad."

110. Basic Law: Freedom of Occupation refers to the rights of "residents," rather than "persons."

111. HCJ 11437/05 *Kav LaOved v. The Ministry of Interior* (Apr. 13, 2011), Nevo Legal Database (by subscription, in Hebrew).

112. *Id.* at 160.

113. "Nothing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [prohibition of discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

however, unequivocally criticized by international law scholars[114] and by the Council of Europe itself.[115] As Juliane Kokot and Beate Rudolf wrote:

> The provision no longer reflects the present status of international human rights law. Article 16 dates from a time when it was considered legitimate to restrict the political activities of aliens generally. The underlying rationale was that these activities were apt to disrupt a state's external relations. However, subsequent human rights treaties, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights, all do without such a clause. Legal writers had criticized the provision as being entirely without limits and thus hardly compatible with the system of the Convention.[116]

In *Perinçek v. Switzerland*, a Grand Chamber of the European Court of Human Rights basically adopted this legal stand.[117] It mentioned the position of the European Commission of Human Rights against Article 16, and observed that it

> has never been applied by . . . . the Court, and unbridled reliance on it to restrain the possibility for aliens to exercise their right to freedom

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114. *See, e.g.*, Juan Fernando Durán Alba, Restrictions on the Political Activity of Aliens Under Article 16 ECHR, *in* EUROPE OF RIGHTS: A COMPENDIUM ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS 497 (Javier García Roca & Pablo Santolaya eds., 2012); Juliane Kokott & Beate Rudolf, *Piermont v. France*, 90 AM. J. INT'L L. 456, 458-60 (1996) (claiming that Article 16 allowed for unfettered discretion and thus had to be interpreted in a way that will constrain discretion given to the Contracting Parties); Hélène Lambert, The position of Aliens in Relation to the European Convention on Human Rights 25-26 (2007).

115. In Recommendation 799 (1977) on the political rights and position of aliens, the Council of Europe's Parliamentary Assembly called for Article 16 to be repealed (point 10 (c) of the recommendation). In *Piermont v. France* the Commission argued before the European Court of Human Rights that Article 16 reflects an outdated understanding of international law (see *Piermont v. France*, nos. 15773/89 and 15774/89, Commission's report of 20 January 1994, unpublished, § 58).

116. Kokott & Rudolf, *supra* note 114, at 458.

117. *Perinçek v. Switzerland*, Eur. Ct. H.R., paras. 121-22 (2015), https://hudoc.echr.coe.int/eng?i=001-158235. This was the second case of the European Court of Human Rights to ever discuss Article 16, and the first and only one to date, to rule on its essence. In *Piermont v. France*, 314 Eur. Ct. H.R. (Ser. A) (1995) the Court discussed a petition filed by a German member of the European Parliament, who argued that her freedom of expression was violated while she was visiting French Polynesia and New Caledonia. The Court ruled that Article 16 is inapplicable to a national of a member state of the EU (while visiting another member state), and particularly not to a member of the European Parliament.

> of expression would run against the Court's rulings in cases in which aliens have been found entitled to exercise this right without any suggestion that it could be curtailed by reference to Article 16.

It then ruled that the Article should be interpreted restrictively as only capable of authorizing restrictions on "activities" that directly affect the political process.[118]

Article 16 of the European Convention of Human Rights is, indeed, in variance with current international human rights law. The International Covenant for Civil and Political Rights (ICCPR)[119] — which protects, among other rights, freedom of expression,[120] and which has been ratified by a high number of states worldwide — is clear about the signatory states' responsibility to protect the rights of every person within its territory:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its *territory* and subject to its *jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.[121]

The principle of territorial or jurisdictional application applies in specific areas of international human rights law as well, including in the field of immigration. For example, while a state is obliged, under the Refugee Convention, to protect and bestow rights on refugees within their territory or jurisdiction, it is not obliged to assist refugees or displaced people outside of it.[122]

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118. The grand chamber ruled that Perinçek, a Turkish political figure who was convicted by a Swiss Court for publicly denying the Armenian genocide, is entitled to Article 10 protection, as Article 16 does not apply to the case according to the above-mentioned limited interpretation of it. Hence, the Grand Chamber ruled in favor of Perinçek, and held that he should have not been indicted by the Swiss authorities to begin with. It is not clear what counts as an activity which directly affects the political process. Christoph Grabenwarter, an Austrian legal scholar and the Vice President of the Austrian Constitutional Court, suggested that a foreigner wishing to become the leader of a major party might serve as an exception to that rule. Christoph Grabenwarter, *Reception of Migrants: Material and Procedural Guarantees for Settled Migrants* 4 (European Court of Human Rights Seminar, 2017), https://www.echr.coe.int/Documents/Speech_20170127_Grabenwarter_JY_ENG.pdf.

119. Israel signed and ratified.

120. ICCPR, art. 19.

121. *Id.* at art. 2 (emphasis added).

122. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 26-27 (2d ed. 2014) (" . . . . even the most basic refugee rights can be claimed only once a refugee comes under the jurisdiction of a state party.").

Moreover, the notion that whomever is in a country's territory is entitled to constitutional rights is not only ingrained in domestic legal systems and international law; it is also supported in the writings of some leading political theorists. One of them is Linda Bosniak, who coined the term "ethical territoriality" to reflect the ethical conviction that aliens should be entitled to legal rights ordinarily bestowed by the host country to its citizens, by their mere presence in that country.[123]

One complexity should, however, be mentioned: that of the physical versus the legal presence of the foreigner in the country of destination. Some states, among them the United States[124] and Israel,[125] sometimes employ a legal fiction, according to which a person could be on the state's soil yet — as she was not yet *admitted* into the country (e.g. is in the airport, not allowed to pass through immigration control) — considered to be outside of it. Such a person, fictitiously considered to be outside of the country's territory, is therefore doomed undeserving of certain constitutional protections. This legal fiction has, however, never been adopted by international human rights law.[126]

Political theorists also reject this fiction of physically present yet legally absent, and some of them convincingly argue that these aliens are entitled to constitutional protection despite their short stay in the country of destination. True, the "affiliation" argument, which holds that migrants' rights are based on the ethical weight given to migrants' attachment to the country where they actually live in (its culture, inhabitants, etc.) cannot stand for these aliens. They did not, after all, stay in the country of destina-

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123. *See* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2007).

124. *See, e.g.*, *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (1953). For a discussion of the fiction in American law *see*: Linda Bosniak, A Basic Territorial Distinction, 16 Geo. Immigr. L.J. 407 (2002).

125. *See* HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense (July 7, 2011), Nevo Legal Database (by subscription, in Hebrew) (A petition submitted by a number of human rights organizations that seeks to examine Israel's policy regarding "pushing back" (i.e. deporting) to Egypt of groups of foreigners — among them, potentially, asylum seekers — immediately upon their entry by foot into Israeli territory. The High Court of Justice rejected the petition because the State has decided to suspend the implementation of the said policy).

126. See, e.g., Hathaway and Foster, THE LAW OF REFUGEE STATUS (2nd ed., 2014) 23 ; Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1, 10-28 (2013) (discussing various aspects of the Non-refoulement principle as the source for the principle of non-rejection at the border, while citing relevant case law of the European Court of Human Rights); *Plaintiff M61 and Plaintiff M69 v. Commonwealth of Australia*, [2010] HCA 41; *Amuur v. France*, 1996-III Eur. Ct. H.R. 1.

tion long enough to develop any meaningful connection to it.[127] However, the "jurisdiction" or "mutuality of obligation"[128] argument, which believes that if a state has authority (i.e. legal power) over a person then that person should correlatively hold certain legal rights to protect her from that state's power, applies to any person subordinated by that power, no matter what her legal status in that country is, and the length of her stay in it.

To conclude on this point, which might, in the context of this article, relate to airport detainees, I will argue that an alien has an independent right to freedom of speech (i.e. not dependent on the right of her would-be listeners) from the moment she sets foot in the territory of the country of destination.[129] A country which is disturbed by the idea of yielding such a right to foreigners, is free to use the well-recognized non-entrée method of visa requirement and airline companies responsibility for visa inspection in the country of origin,[130] with its limitations (smuggling) and costs (e.g. foreign affairs concerns and disruption of incoming tourism).

So far, we discussed the first axis, which revolves around the foreigner. The "inside/ outside country of destination" dichotomy is irrelevant, after all, to citizens who wish to exercise their constitutional rights, as they are free to enter their own country,[131] where they could exercise their rights, whatever they are. The second axis, in contrast, relates both to the citizen and the foreigner who engage, or wish to engage, in a conversation in the citizen's country.

Since freedom of speech protects, among other things, open communication, and as communication involves at least two persons (the speaker and the listener, who might constantly change roles), both sides could invoke their putative right to freedom of speech against a governmental curtailment of it. Indeed, freedom of speech includes the right to listen to someone

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127. Bosniak, *supra* note 123, at 405-06.

128. NEUMAN, *supra* note 2, at 97-117.

129. However, given the fact that some of the rationales (i.e. the attachment one) for bestowing that right on "physically present" aliens do not stand for short term visitors, such aliens' right to freedom of speech could be more easily overridden by a compelling governmental interest, as compared to the right of an alien who has been long term resident in the country. Yet, the right is accorded to the short-term visitor as well, and a compelling governmental interest must be shown in order to override it, in the least restrictive manner.

130. *See, e.g.*, Hathaway & Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, at 244-245 (2015).

131. Article 12(4) to ICCPR. For Israeli law, see Article 6(b) to Basic Law: Human Dignity and Liberty. For American law, *see Tuan Anh Nguyen v. INS*, 533 US 53, 67 (2001): "Congress is well within its authority in refusing . . . . to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, *to the absolute right to enter its borders* . . . . ." (emphasis added).

else's monologue and the right to gather information.[132] This insight is especially relevant when the speaker is a foreigner, wishing to enter another country for the purpose of communicating with a listener, who is a citizen of that country. While the foreigner cannot — as explained above — claim a right to enter that country, regardless of her wish to express herself there (neither by most countries' domestic constitutional law nor by international human rights law), the local citizen can invoke her own right to listen to the foreigner, under the auspices of the right to freedom of speech, as a reason to allow the foreigner in.[133] To complicate things, I will add that the *citizenry*, and not only a particular citizen, might also have a collective right that the government would not suppress speech based on its political content, as part of its collective right to self-governance. I will elaborate on this point shortly.

Consider the case of *Mandel*: American would-be listeners, such as Stanford University, asked the Federal government to let Mandel in, so that *they*, not Mandel, could exercise their right to free speech, by listening to him. The American Supreme Court indeed acknowledged that the American respondents' constitutional right to freedom of speech was restrained and therefore found they had standing. It further rejected the Government's stance that the Court owed *absolute* deference to the Executive in visa denial cases, even when the denial supposedly violates the constitutional

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132. *See, e.g.*, in Israel, HCJ 243/62 *Israel Movie Studios Ltd. v. Greg*, 16 PD 2407, 2414-2415 (1962).

133. What about the citizen's right to speak before the foreigner in the citizen's own country? In other words, can a citizen-speaker demand the entry of a foreigner-listener to her country, in the name of her (the citizen's) right to freedom of speech? For example, can a university invoke its right to freedom of speech in order to admit a foreigner into the country as an audience member, rather than as a speaker in a conference that it arranges? Here are some preliminary thoughts on this matter. First, most often there is no real dichotomy between the speaker and the listener of a conversation, as they constantly change roles. So the question becomes limited to rare cases in which the foreigner is a "pure" listener. In these rare cases, the foreigner who is out of the country cannot invoke her own right "to listen" (and enter the foreign country for that sake), and the question becomes, as mentioned: can the local speaker claim a right to speak face-to-face before a foreigner, hence justifying the entry of the foreigner for that cause. I think the right could potentially be invoked; however, it might not be strong enough to overcome governmental interests, compared to the right to *listen* to a foreigner. The question is what is the value of "purely" speaking in front of a foreigner that justifies her entry into the country, if there are governmental interests against it. There could be cases in which speaking before an audience of aliens carries special value: for example, when the mere presence of the foreigner-listener in the foreign country carries a symbolic (expressive) value or when the main aim of the citizen-speaker in her speech is to target or influence the foreigner-listener qua foreigner.

rights of American citizens — such as prospective listeners, who wish to listen to the foreigners. Yet, the Court refused to apply the strict scrutiny standard that it regularly applies when reviewing governmental acts that infringe on citizens' freedom of speech. Instead, it used the "facially legitimate and bona fide" standard of review — without explaining its source.[134] As mentioned above, years later — in the *Trump v. Hawaii* case — the Court agreed, based on the Government's own accession, to use the only slightly broader rational basis standard.

On its face, one could think of reasons to advocate for a more limited standard of review in the discussed type of governmental action — i.e., barring the entry of foreign speakers despite its effect on would-be local "listeners" — in the name of immigration control. In *Mandel*, Justice Blackmun, writing for the majority, engaged with this matter. He wrote:

> Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a *bona fide* claim is made that American citizens wish to meet and talk with an alien excludable under §212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.[135]

Justice Marshall, in his dissent, responded as follows:

> I do not mean to suggest that, simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests that would surely be compelling. But, in Dr. Mandel's case, the Government has, and claims, no such compelling interest. Mandel's visit was to be temporary. His "ineligibility" for a visa was based solely on §212(a)(28). The only govern-

134. As Justice Marshall wrote in his dissent: "No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule." *Kleindienst v. Mandel*, 408 U.S. 753, 777-78 (1972).

135. *Id.* at 768-69.

> mental interest embodied in that section is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. Section (a)(28) may not be the basis for excluding an alien when Americans wish to hear him. Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted.[136]

With all due respect, Justice Marshall's minority opinion seems to be sounder; and I could therefore only hope that Israeli Courts, becoming more and more engaged these days in this matter of ideological exclusion of foreigners, would endorse his — rather than Justice Blackmun's — view. Justice Blackmun warns that the application of the strict standard of review, regularly applied in First Amendment cases, would lead to a disastrous outcome, in which either the Executive loses its authority over immigration altogether, or that the Executive and the Court are forced to delve into the impossible task of assessing the value and importance of the speech. Yet the first scenario is unfounded, and the second ignores decades of judicial balancing between the right to free speech and compelling governmental interests. Let me explain.

Regarding the loss of the Executive's authority over immigration: first, the authority of the Executive in a democratic society — or, more precisely, the discretionary exercise of such authority — indeed becomes more limited when it collides with a constitutional right of a person, and specifically freedom of speech. This is true of any authority, including the authority over public safety, public order and public health — just to name a few — and the authority over immigration is no different.

Second, as Justice Blackmun correctly observed, the tension between immigration control and free speech rights arises when a citizen makes a *bona fide* claim that she wishes to engage in a discussion with a foreigner. It is the Executive's job to decide whether a claim is *bona fide* or not, and the Judiciary seldom interferes with the fact-finding process and outcome of the Executive in constitutional litigation. Just as immigration authorities deal with sham marriages, between a citizen and an alien, so they can and should deal with sham dialogues. And just as the real risk of sham marriages does not preclude family reunification, so the risk of false-conferences, for example, should not lead to the disregard of the authentic wish of decent citizens to engage in a discourse with foreign speakers. Moreover, there is no reason to expect a scenario in which countless unwanted immigrants flood the streets of the U.S (or Israel) by conspiring with local citizens who deceive

136. *Id.* at 783-84.

the immigration authorities that they intend to engage in discourse with them.

Third, the right to listen and engage in conversation, as most human rights, in not absolute. If immigration control is a compelling governmental interest, and indeed I think it is, under current international legal order, then it could — in particular circumstances — override the constitutional right of the local "listeners." This leads me to respond to Justice Blackmun's second concern, that balancing between the constitutional right and the governmental compelling interest would inevitably result in the government's taking into considerations "factors such as the size of the audience or the probity of the speaker's ideas." Justice Blackmun, however, ignores the fact that courts already engage in the craft of balancing when, for example, freedom of speech interferes with public safety, public order or other governmental compelling interest, or when it collides with someone else's constitutional right (e.g. her right to privacy or freedom of movement). Courts developed rules for the balancing of interests in such cases, and an expertise in implementing them. They established, for example, a different level of protection for different types of speech (political, artistic and commercial).[137] They also adopted different tests for balancing between the competing interests (e.g., the "clear and present danger" test in enticement cases).[138] Of course, there are hard cases and borderline cases, but the legal rules and precedents already exist, and courts and the Executive have gained decades of judicial experience in the art of balancing, in both the United States and Israel. There is no reason that things would be different when the governmental interest is immigration control.

Take, for example, an alien who wishes to enter the country in order to attend a conference. Can the Executive refuse to grant her a visa for the sole reason that the conference is expected to be critical of the government? I would answer in an emphatic "no." This seem to follow even from *Mandel*, as the wish to suppress political criticism is not a "facially legitimate" reason for refusing entry of foreigners, and this was the ruling of Judge Baron in the *Alqasem* case discussed below.[139] Even if foreigner herself has no right to enter, the local audience has a right to listen to this criticism, as discussed above in detail. As ruled in *Police Department v. Mosley*, "above

137. *See, e.g.*, HCJ 5239/11 *Uri Avnery et al v. The Knesset et al.*, 71 (Apr. 15, 2015), Nevo Legal Database (by subscription, in Hebrew); *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 US 748, 764 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and holding that "[g]eneralizing, society also may have a strong interest in the free flow of commercial information.").

138. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (United States); 73/53 *"Kol Haam" v. Minister of Interior*, 7 P.O. 871 (1953) (Isr.).

139. *Supra* note 14.

all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[140] Indeed, "viewpoint discrimination"[141] is an unconstitutional infringement of freedom of speech. Just as the government cannot block a foreign internet site or ban the import of a book based solely on its content, with very few exceptions, so it cannot ban the entry of a foreigner just because of what idea she might express while in the country. After all, one of the rationales of freedom of speech is fostering public deliberation on political matters, as a pre-requisite for self-governance.[142] Banning the anti-governmental foreigner is, therefore, an infringement of the citizenry's right to be exposed, eagerly or not, to a relevant and not necessarily valid opinion.

Now, consider that the alien who came to attend the conference wishes to extend the three months entry visa, that she — like most visitors to Israel — got upon entering the country, so that she could become more involved in her political activism in Israel. If the government refuses to renew her visa due to the concern that longer periods of stay might lead to a settlement of the foreigner in the country, which the state wishes to prevent, then this is supposedly a compelling governmental interest which would apply to the "political" immigrant as well. To legally compel the government to prolong her visa, she and her local allies would have to establish that the freedom of speech concerns, associated with her prolonged stay, outweigh the compelling governmental interest in immigration control, and that therefore there is a justification to give her a "special treatment" concerning the length of stay. This argument would probably not be an easy one to make. Armed with such theoretical and doctrinal background, let us now analyze the three Israeli cases described above.

III. Ideological Exclusion in Israel: Three Case Studies

Israeli jurisprudence on immigration, like its American counterpart, underlines the notion of SEP. Countless court decisions stressed that the Israeli government, and the Minister of Interior in particular, hold very broad discretionary power in matters of immigration.[143] However, Israeli Courts also stressed that broad power in the realm of immigration does not

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140. *Police Department v. Mosley*, 408 U.S. 92, 95 (1972); for a similar ruling in Israel see CA 751/10 *Ploni v. Dayan*, 38 (Feb. 8, 2012), Nevo Legal Database (by subscription, in Hebrew).

141. Kent Greenawalt, *O'Er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. Rev. 925, 931-32 (1990).

142. Alexander Meiklejohn, Political Freedom 24-28 (1960).

143. *See, e.g.*, HCJ 758/88 *Kendall v. Minister of Interior*, 46(4) PD 505 (1992).

mean absolute power.[144] Like in the U.S., Israeli precedents hold that constitutional considerations may, at times, support applications for entry and continued stay of aliens in the country, either based on the aliens' independent constitutional rights (at least in cases of continued stay),[145] or based on citizens' constitutional rights, which indirectly enable entry or continued stay of "piggybacking" aliens. However, and despite the *Levy* case mentioned above,[146] Israeli Knesset and Courts, as will be discussed below, do not always recognize the effect which Israelis' freedom of expression bears on allowing the entry or continued stay of aliens with whom they dialogue, and definitely overlook the independent right of aliens themselves to freedom of speech in Israel (in cases in which the alien is already in the country). To demonstrate this contention, I will analyze three case studies from the last decade.

The first discussed case below, that of a Messianic Jew who was deported for holding a sign in support of "Jews for Jesus," is an intriguing and — I will argue — disturbing case, in which the freedom of speech perspective, including the right of Israeli citizens to interact with the foreign Messianic Jew, was completely absent from the judicial analysis of all three instances adjudicating the case.

The second case study is that of the Israeli-Palestinian Bereaved Families for Peace, which petitioned the High Court of Justice in 2018, and once again in 2019, against the Ministry of Defense's decision to deny entry of Palestinian bereaved families to enter Israel in order to participate in an alternative Memorial Day ceremony annually held in Tel Aviv, side by side with the Israeli bereaved families. In both its 2018 and 2019 decisions, I will argue, the Court correctly allowed the Palestinian bereaved families into the country. Yet, most of the Court's reasoning in 2018 revolved around administrative law considerations of "reasonableness," while ignoring the bereaved families' joint expressive activity and the constitutional defense it is entitled to. This might be the reason that the Ministry of Defense decided again to prevent entry of the Palestinian bereaved families a year later. In the second ruling, the Court finally used clear freedom of expression reasoning and terminology.

Finally, I will discuss the 2017 Anti-BDS immigration law, and the litigation that it generated so far. Here, too, I will contend, the "right to listen" of Israelis was not given the full normative power that is due.

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144. AdminA 1038/08 *State of Israel v. Javitz*, (Aug 11, 2009), Nevo Legal Database (by subscription, in Hebrew), at 21.

145. See, e.g., HCJ 11437/05 *Kav LaOved v. The Ministry of Interior*, (Apr. 13, 2011), Nevo Legal Database (by subscription, in Hebrew).

146. *Supra* note 13.

A. *The Messianic Jew Case*

Barry Martin Lawrence Barnett is a UK national born in 1963, and a self-identified Messianic Jew. He entered Israel with a three-month B/2 "tourist" visa in November 2013. Such a visa is issued to a person who "wishes to enter Israel for a visit or any other purpose, which requires only a short sojourn in Israel, provided that it is not for the purpose of work, whether for remuneration or not."[147]

Two weeks later (and several days before his flight back to the UK was scheduled for) Barnett was inspected in a cross-road in Southern Israel holding a sign which said: "Yeshu-Yeshua-Yeshuah," a Hebrew slogan used by Messianic Jews in Israel, which emphasized the Hebrew origin of the name of Jesus, and its denotation to salvation, and handing out leaflets. Three Israelis took part in the same activity with Barnett.

What caused the immigration inspectors to arrive to the place and check Barnett's papers, is unclear. Two inspectors wrote "activity reports"[148] concerning Barnett's initial hold up, but none disclosed what brought them to the scene to begin with. Inspector Assaf wrote that the inspection team, consisting of four inspectors, "observed two couples standing with 'Yeshu-Yeshua-Yeshuah' placards," but did not elaborate if they noticed the four in a routine or haphazard drive by, or if they came there based on a specific call. Inspector Azran wrote that the inspection was a "proactive activity," but did not elaborate on the source and reason for this proactivity. The doubt is being raised here since instances of "ratting" to the authorities on activities of Messianic Jews — a highly unpopular group in

147. Article 5 to the Entry to Israel Regulations, 1974.

148. On file with author.

the eyes of Israeli authorities and public[149] — is a well-documented phenomenon in Israel.[150]

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149. *See, e.g.*, Pauline Kollontai, *Messianic Jews and Jewish Identity*, 3 J. MODERN JEWISH STUDIES 195, 201-213 (2004) (opposition to Messianic Jews from within the Jewish communities and Israel and the U.S, documenting also violent attacks against Messianic Jewish synagogues by other Jews); Temar Zieve, *Will Israel Ever Accept Messianic Jews?*, JERUSALEM POST (16 Dec. 2017), https://www.jpost.com/Israel-News/Diaspora-Affairs-Will-Israel-ever-accept-Messianic-Jews-518129. The Supreme Court ruled in HCJ 265/87 *Beresford v. Minister of Interior*, 43(4) PD 793 (1987) that Messianic Jews, even if Jewish under Halacha (Jewish Law) are not entitled to naturalization under the Law of Return. *See also* Aaron R. Petty, *The Concept of Religion in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211, 249-54 (review of the opinions delivered by Deputy President of the Supreme Court, Judge Elon, and by Judge Barak); Yaacov Ben-Shemesh, *The Law and the Shaping of National Memory: The Case of Messianic Jews*, 10 ALEI MISHPAT 177 (2012) (Isr.) (examining Deputy President Elon's opinion thoroughly and claiming that Elon's grasp on Judaism is subjective and contingent). *See also, e.g.*, HCJ 8735/06 *Comforti v. Council of the Chief Rabbinate of Israel*, Tak-SC 2009(2) 4347 (holding that the Council of the Chief Rabbinate of Israel was wrong to take into consideration the fact that the appellant is a Messianic Jew, thus refusing to grant her bakery a Kashrut certification); File No. 3060/02 Administrative Court (Jer), *David Stern v. Palestine Post Ltd.* (Nov. 11, 2003), Nevo Legal Database (by subscription, in Hebrew) (A 2:1 holding that the respondent, the sole Israeli daily newspaper being published in English at that time, may discriminate against Messianic Jews and refrain from publishing ads concerning them); File No. 16166-01-11 Administrative Court (Jer), *Danur v. Ministry of Interior* (Jan. 8, 2012), Nevo Legal Database (by subscription, in Hebrew) (holding that the Ministry of Interior, in denying her application for citizenship, was wrong to take into consideration the fact that the applicant, who married an Israeli citizen, is a Messianic Jew); File No. 5716-11-10 Administrative Court (Jer), *Henson et al. v. Ministry of Interior* (June 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (holding that the respondent was wrong to take into consideration a loosely based report regarding the applicants' alleged missionary activity while denying their request for a Clergy visa); File No. 11624-12-15 *Hodous et al. v. Vasilio events Ltd.* (Feb. 1, 2017), Nevo Legal Database (by subscription, in Hebrew) (holding of damages against the owner of a wedding venue who refused to service a Messianic couple); File No. 2979-17 Court of Appeals of The Entry into Israel Law, 1952, *Van der Valt v. Population and Immigration Authority* (Dec. 5, 2017), Nevo Legal Database (by subscription, in Hebrew) (holding that the Ministry of Interior mustn't decline appellants' request for a tourist permit solely because of the fact that they are Messianic Jews who have organized tours in Israel for over 20 years).

150. "Yad L'Achim," a non-governmental organization, operates a hotline in which people can notify the organization of missionary activities all around the country. The organization's background and mission, as described in its website is as follows: "Yad L'Achim was established in 1950 to help new immigrants adjust to the newly born country and to help them find a suitable religious framework. It is a non-profit organization with no political affiliation. Over the years, its attention has turned to more

Inspector Assaf's report describes the placards, that the four (two Israeli men, one Israeli woman and Barnett) were holding, their dismay with the inspectors' intervention in their protest, and Barnett's agreement to go with the inspectors to the immigration station, after his initial refusal. He ends his report with the words: "It should be noted that the foreigner [Barnett] is a B/2 tourist who violated his visa by handing out flyers and holding signs intended for religious persuasion (Jesus)."

Inspector Azran wrote in her report that Barnett was also wearing a T-shirt with a "Jews for Jesus" slogan, and handed out a leaflet titled "Jesus saved me," a copy of which she attached to her activity report. She wrote: "I asked [Barnett] what was the purpose of his visit in Israel and he replied that he came on vacation and for volunteering for the non-profit organization for whom he held the signs . . . . he further argued that he does not get any money for it."

In the station, Barnett underwent what was supposed to be a hearing regarding MOI's intention to revoke his visa[151] The "hearing" form states the following (syntax and punctuation errors in origin; author's translation):

> **Elaboration of facts:** B/2 tourist engaged in messianic activity.
>
> **Content of the hearing:** On 20/11/13 in Tel Sheva junction the aforementioned held signs in which it was stated who wants to join the faith of Jesus. Also handed out flyers to bypassers.
>
> **Decision:** Revocation of B/2 visa.
>
> **Foreigner's response to revocation of his visa:** I have nothing to say.

In another form, "Announcement of visa revocation," issued apparently following the "hearing," the given reason for the visa revocation is

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complex problems, including how to counter the missionary threat . . . . Fighting the missionaries, who have millions of dollars a year at their disposal, has long been one of Yad L'Achim's top priorities." http://yadlachim.org/?CategoryID=188. It operates a "counter missionary department," the activities of which is described as follows: "We fight the missionaries in a variety of ways, some of which, due to their sensitive nature, can't be described in detail. One of our most important functions is to track the activities of missionaries and respond to them in appropriate ways." http://yadlachim.org/?CategoryID=196&ArticleID=554

151. Actually, it was not much of a hearing, as Barnett was asked to respond *after*, rather than before the decision to revoke the visa was taken.

"messianic activity." Another form, a deportation order, states that Barnett is barred from entering Israel for a period of ten years.[152]

Following the "hearing" regarding his visa revocation, Barnett underwent a second hearing, this time regarding his possible detention until deportation. In this hearing he was asked why he held the signs, and replied: "I believe that Jesus is the Messiah, and wish to join people in." At the end of the hearing the MOI's decision is "to keep [Barnett] in custody until deportation — messianic activity." Because of his detention, Barnett missed the pre-scheduled flight back to the UK, that he purchased in advance.

The custody tribunal, which heard Barnett's case four days later,[153] wrote that the Ministry of Interior revoked Barnett's visa "after it found that he was engaged in missionary activity — spreading the ideas of Messianic Jews." However, in the oral hearing before the tribunal, the MOI gave for the first time an additional reason for the visa revocation and deportation order: Barnett was not a tourist, but rather worked or volunteered for a nonprofit organization (whose flyers he handed out) without obtaining the proper visa.[154] Barnett violated, MOI claimed, Article 5(d) of the Entrance to Israel Regulations, which provides that "a person wishing to enter Israel in order to temporarily work without remuneration would apply for a visa and a B/4 type of a visit permit (volunteer)." Barnett, it should be recalled, held a B/2 (tourist) rather than a B/4 (volunteer) visa when he entered the country.

Barnett's lawyer argued before the custody tribunal that Barnett was merely exercising his right to freedom of expression, protected by the United Nations World Tourism Organization (UNWTO) Global Code of Ethics for Tourism,[155] which Israel has signed.[156] The judge disregarded the argument. He ruled that "without delving into the criminal implication of

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152. There is a default rule of ten-year ban on re-entry of a person who was deported from Israel. *See* section B.2.1 to MOI procedure 5.4.0001 on issuing of B/2 (Visitor) visas.

153. File No. 1486185 Immigration Detention Review Tribunal (Give'on) (Nov. 24, 2013).

154. As mentioned above, inspector Azran did write in her activity report that Barnett mentioned volunteering as one of his reasons for the visit, and the matter was also mentioned in Barnett's pre-detention hearing. However, this matter was NOT mentioned as a reason for the visa revocation, deportation and detention.

155. http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetbrochureglobalcodeen.pdf

156. The code, however, is not a legally binding instrument. A better reference would, therefore, be to Article 19(2) of the International Covenant on Civil and Political Rights (right to freedom of expression), in conjunction with Article 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory.").

the detainee's alleged activities" he would release Barnett from custody, as he was convinced that Barnett would leave Israel on his own. He set a bail, ordered Barnett to leave the country within ten days, and clarified that Barnett "would not engage in prohibited missionary activity until he leaved Israel." It should be noted, that Israeli law does *not* prohibit persuading a person to proselytize, as long as the person is an adult, and the persuasion does not involve any financial or material return.[157] It was never argued that Barnett did either of the two.

After Barnett left Israel, he filed a petition with the Administrative Court to cancel the MOI ten years reentry ban. MOI's principal reasoning now was that Barnett volunteered for a non-profit, and therefore should have obtained a volunteer (B/4) visa, and not a tourist (B/2) visa. Barnett's lawyer objected to this shift in reasoning, and relied on Supreme Court precedents, holding that Courts would be suspicious towards a new reasoning, which the Executive did not give at the time of the decision (i.e. prior to litigation).[158]

The Administrative Court overlooked MOI's shifting in arguments. It stated that in the MOI pre-detention hearing, Barnett said that he entered Israel "in order to persuade people to join the faith and support of Jesus," but he admitted that in the border control of Ben Gurion airport he declared that he came on a vacation; and that he further admitted in the hearing that his accommodation in Israel was covered by the NGO whose flyers he disseminated. "Under these circumstances," the judge concluded, "there is a factual basis for the respondent's finding that the petitioner indeed worked — either for free or for remuneration, in opposition to his declaration in the border that he came on vacation."[159] Hence, the petition was denied. An appeal to the Supreme Court of Israel was dismissed for the same reason. Also, in the meantime, the MOI has allowed Barnett to re-enter the country after depositing money as a guarantee to leaving the country on time and with a declaration that he would not engage in prohibited proselytization, a fact that made the original deportation order more proportionate in the Court's view.[160]

As I see things, we have here a case of a foreigner who engaged in an expressive activity with Israelis. His engagement was, first, with the three

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157. Art. 174A, 368 Penal Law, 5737-1977.

158. HCJ 517/72, Snowcrest (Israel) *Ltd. v. Mayor of Bnei Brak* 27(1) P.D. 632(1973). For a similar doctrine, as applied in the UK in deportation proceedings, *see Reg. v. Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243, 302.

159. AdminC (Cr.) 11986-02-14 *Barnett v. Population and Immigration Authority et al.* 4 (Apr. 20, 2014), Nevo Legal Database (by subscription, in Hebrew).

160. AdminA 3919/14 *Barnett v. Population and Immigration Authority et al.* 4 (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew).

Israelis he held up signs with, and with the "Jews for Jesus" Israeli branch, with whom he grouped. Indeed, people often associate to advance shared beliefs and programs, and the constitutional right of freedom of expression protects such kind of activity.[161] Second, with the Israeli public: the ones he handed out leaflets to (and possibly engaged in conversation with) and the drivers who drove by and saw his sign in the Tel Sheva junction.

As Barnett was present in Israel at the time of his apprehension, and not just wishing to enter the country from abroad, he himself had a protected right to freedom of speech, as a speaker, wishing to express himself and influence the public debate on this religious matter in Israel.[162] Moreover, Barnett held a valid tourist visa when he was engaging in the demonstration, a visa that the immigration authorities revoked thereafter. According to a long-standing doctrine of Israeli administrative law,[163] the Executive must be more cautious in revoking a permit as compared to refusing to grant a permit to begin with, or refusing to renew one.

Apart from Barnett's own rights, there are also the rights of the other Messianic Jews and citizens of Israel to associate with him, and engage together in awareness raising and persuasion for their common belief. Of special importance here is the fact the Messianic Jews are a religious minority, extremely unpopular in Israel.[164] Freedom of speech jurisprudence directs the authorities to protect and defend the views of unpopular groups with special determination and decisiveness.[165] Additionally, there is the right of Israeli "listeners" to see the signs, read the leaflets and be convinced (or not) by them.

The three instances that discussed Barnett's case were completely blind to all these considerations. Somehow, the ordinarily highly applauded principle of freedom of expression — of Barnett, of his fellow Israeli Messianic Jews, and of the Israeli public — was completely overlooked. None of the judges of the three instances asked themselves, why did the immigration officers come to the remote Tel Sheva junction to begin with. could it

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161. *See* in the U.S.: *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958).

162. *See supra* note 156 (on Article 19 of the ICCPR); *supra* notes 108-110 and accompanying text (on Basic Law: Human Dignity and Liberty).

163. HCJ 113/52 *Zacks v. Minister of Trade and Industry*, 6(1) IsrSC 696, 700 (1952); HCJ 799/80 *Shlalam v. Licensing Officer Pursuant to the Firearms Law*, 36(1) IsrSC 317, 327 (1981). In AdminA 7216/18 *Lara Alqasem v. Immigration and Population Authority*, para. 17 (Oct. 18, 2018), Nevo Legal Database (by subscription, in Hebrew) Judge Hendel gave a restrictive application to this doctrine in matters of entry visas.

164. *See supra* note 149.

165. *Hague v. Comm. For Ind. Org.*, 307 U.S. 496 (1939).

be religious profiling[166] — or even worse: religious harassment?; why did they question and apprehend him despite the fact that he showed them a valid tourist visa?; and why did the Ministry of Interior not mention the "B/4 (volunteer) vs. B/2 (tourist) visa" argument in the early correspondence it had with Barnett's lawyer? Instead of dealing with these weighty questions, the court either clung to the formalistic matter of the type of visa Barnett held;[167] or even worse, unfoundedly and erroneously insinuated[168] that Barnett's expression was "missionary" and therefore illegal—an insinuation that by itself buttresses the claim of harassment of Messianic Jews in Israel.

In my opinion, the circumstances surrounding Barnett's visa revocation, detention and deportation are alarming. The fact that the judicial system did not pay any attention to the arguments that Barnett's lawyer made — i.e. that his client was deported due to his views — is disturbing. The evidence supports Barnett's argument, but all three instances refused to examine it, and to acknowledge that this seems to be a clear case of religious harassment.

Even under the *Mandelian* extremely low (and highly criticized) standard of review, the acts of the authorities in the Barnett case, with their transgression on freedom of speech, seem to be unconstitutional. The reason given by the Israeli authorities for deporting Barnett, just like the reasons given by the American authorities for refusing the entry of Mandel, was visa violation. This could very well be a "facially legitimate" reason, as the *Mandel* court indeed ruled. However, the full *Mandelian* test talks about "a facially legitimate *and* bona fide reason." Can the authorities, which ini-

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166. File No. 11387-09-14 Regional Labor Court (TA), *State of Israel Population and Immigration Authority v. Erez Rubinstein* (Feb. 4, 2017), Nevo Legal Database (by subscription, in Hebrew) (appeal pending on File No. 42453-03-17 National Labor Court (Jerusalem), *State of Israel Population and Immigration Authority v. Erez Rubinstein*) (holding that surveilling a woman just because of her "Asian appearance" is illegal, and therefore may not be used as evidence in trial against her employer for illegal employment).

167. Even if it were true that Barnett violated the conditions of his tourist visa by volunteering for a religious non-profit, the court could have inquired whether it was a bona fide mistake on Barnett's part, to be pardoned rather than punished. What exactly a tourist can do under a B/2 visa in Israel is indeed unclear, and therefore such visa holders are prone to mistakenly interpret it. For example, while article 5 to the Entry to Israel Regulation, 1974, provides that a B/2 visa is for "a short sojourn in Israel, for purposes other than work," when I asked the MOI — under the Freedom of Information Act — what type of visa should a person, who comes to do business in Israel, obtain — the answer was a B/2 visa (letter of Ms. Davidian to author dated Aug. 10, 2015).

168. The Custody Tribunal explicitly mentioned this, supra note 153. During the litigation before the Supreme Court, MOI finally agreed to let Barnet re-enter Israel, but asked him to sign an obligation that he would not engage in illegal proselytization.

tially mentioned "Messianic activity" as the reason for Barnett's visa revocation, and only later introduced the "volunteering tourist" argument, be considered to act in good faith? I believe the evidence runs against such a conclusion.

If there is any doubt whether Barnett could survive the *Mandel* test, this doubt dissipates when we turn to the rational basis test, endorsed in *Trump v. Hawaii*. According to this test, the Court would not simply take the government's word for what was its reason for the visa refusal (here — revocation), but would roll up its sleeves and delve into the nasty work of looking into actual evidence. If the *Barnett* court would have taken a moment to read the "activity report" of inspector Assaf, the protocol of the visa revocation hearing, the statement of visa revocation or the other documents described in detail above, it would have realized, I believe, that the visa violation was nothing more than a pretext for what was patently religious harassment, speech suppression and misuse of governmental power. Barnett's apprehension did not promote any important or legal interest; it was pure silencing of an unpopular view.

Obviously, a strict scrutiny test — the test I advocate for, following Justice Marshall's dissent in *Mandel* and Justice Sotomayor's dissent in *Trump v. Hawaii* — would have led to granting Barnett's motion. According to this test, the court investigates if there is a compelling governmental interest that would outweigh the right to freedom of speech. Here, the right can be claimed by several entities (Barnett, his fellow Messianic Jews, the Israeli public), and the governmental interest – to ensure that tourists do not do *volunteer* work during their stay – is not so compelling. If it was the real reason for the deportation to begin with, and, moreover, if Barnett had a bona fide mistake regarding his visa conditions, a matter that was not seriously considered. The decision of ten-year entry ban, therefore, seems highly disproportionate. An interesting point to be noted is that while both the Administrative Court and the Supreme Court rejected Barnett's petition and appeal, respectively, they both related to the matter of proportionality, highlighting the fact that Barnett would, in reality, be able to re-enter Israel before the ten-year ban is over.[169] This referral might indicate that Israeli

169. The Administrative Court signed its decision with these words: "It was made clear, that by the MOI's perspective, the petitioner will not face a complete ban on entry to Israel, but for the next ten years will have to apply in a request to the MOI, if he wishes to enter. This is a proportionate and reasonable decision, and the Court will not intervene in it." AdminC (Cr.) 11986-02-14 *Barnett v. Population and Immigration Authority et al.* 4 (Apr. 20, 2014), Nevo Legal Database (by subscription, in Hebrew).

During the litigation before the Supreme Court, Barnett's request to re-enter Israel was granted. The Supreme Court wrote: "The fact that the ban was softened by adding the option for the appellant to apply for a Visa is sufficient for the determination that

Courts are open to the idea of strict scrutiny in cases of foreigners' exclusion on ideological grounds.

B. *The Israeli-Palestinian Bereaved Families for Peace Case*

The Memorial Day Law for the Fallen of Israel's Wars, enacted in 1963, provides that "[t]he fourth of Iyar will be the Memorial Day for soldiers of the Israel Defense Forces who made the ultimate sacrifice in order to assure the existence of the State of Israel, as well as those who fell in the campaigns to create the State of Israel, to memorialize them and pay tribute to their courage."[170] The law further provides that on Memorial Day two minutes of silence will be observed throughout the entire country; flags will be lowered to half-mast in all public buildings; and ceremonies, commemorations and public gatherings will take place.

For over a decade, an alternative memorial ceremony takes place in Israel, at the exact date that the Memorial Day Law stipulates as the annual day for commemorating the fallen. This alternative ceremony is organized by "The Parents Circle — Families Forum (PCFF)," a joint Israeli-Palestinian non-profit organization of over 600 families, all of whom have lost an immediate family member to the ongoing Israeli-Palestinian conflict. According to the organization's website, "the PCFF has concluded that the process of reconciliation between nations is a prerequisite to achieving a sustainable peace. The organization thus utilizes all resources available in education, public meetings and the media, to spread these ideas."[171]

In the PCFF alternative ceremony, bereaved Israeli families sit side by side with bereaved Palestinian families, share their grief and aspiration for peace. Representatives of the two peoples go on stage and read texts. The message is one of solidarity and recognition that due to the ongoing conflict, both sides suffer. As years go by, more people attend the PCFF ceremony, taking place in Tel Aviv. In 2017, the year before the case came to Court for the first time, the number of participants rose to 4000. Nevertheless, the event remains out of consensus in Israeli public.

Until 2018, the Civil Administration office of the Israeli Defense Forces (IDF) allowed Palestinian bereaved families from the Occupied Palestinian Territories (OPT) to attend the ceremony, by issuing them a short

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the order does not prevent his entry in an absolute manner." AdminA 3919/14 *Barnett v. Population and Immigration Authority et al.* 4 (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew).

170. Memorial Day Law for the Fallen of Israel's Wars Law, 1963-, https://www.knesset.gov.il/laws/special/eng/MemorialDayLaw_eng.htm

171. *See About PCFF*, THE PARENTS CIRCLE http://theparentscircle.org/en/about_eng/ (last visited Oct. 31, 2018).

term permit into Israel, unless there was a security concern that allegedly prevented it.[172] In 2018, Minister of Defense Avigdor Liberman refused for the first time to allow any of the Palestinians in for the purpose of attending the alternative ceremony. He tweeted:

> I decided to bar entry to Israel of . . . . Palestinians who were invited to an Israeli-Palestinian "joint ceremony" to be held on the evening of Memorial Day. I will not allow desecrating Memorial Day. It is not a memorial ceremony but rather an exhibition of bad taste and insensitivity, which hurts the bereaved families, who are most dear to us.[173]

In the formal refusal, which followed Liberman's tweet, the deputy legal advisor of the Ministry of Defense wrote to PCFF that the State holds broad discretion in deciding whether to allow foreigners into the country; and that the alternative ceremony hurts the feelings of the general public in Israel, specifically a significant portion of the bereaved Israeli families. Further, the ceremony could potentially be held outside of Israel, in a manner that would not hurt the feelings of the general public as much. All these arguments were repeated by the State before the High Court of Justice, when PCFF and others petitioned against the Minister of Defense's decision.[174] The petitioners, on their part, argued that the decision to ban entry of Palestinians to the ceremony infringes on the freedom of expression of the organizers and the participants of the alternative ceremony, and their right to commemorate their loved ones as they see fit. They further stressed that the mutual ceremony intends to promote dialogue, reconciliation and the bringing together of Jews and Palestinians.

The Court ruled in favor of the petitioners and ordered the Minister of Defense to issue temporary permits to 90 Palestinians — the same number that was approved for that cause in a previous year — to enter Israel from the OPT in order to attend the ceremony.

The Court reasoned as follows:

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172. For IDF regulation on entry of Palestinian civilians into Israel see: Civil Administration Office of the Israeli Defense Forces, Unclassified Permission Status for the Entrance of Palestinians to Israel, for their Passage between Judea and Samaria and the Gaza Strip, and Their Exit Abroad (2019) (in Hebrew), http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50.pdf.

173. HCJ 2964/18 *The Parents Circle — Families Forum (PCFF) v. Minister of Defense* (Apr. 16, 2018), Nevo Legal Database (by subscription, in Hebrew).

174. *Id.* An additional argument, according to which some of the Palestinian invitees are relatives of terrorists, who were killed while trying to execute their terrorist attacks, was later withdrawn by the State's legal representatives, who apologized before the Court for making this unfounded argument.

> We examined the Minister of Defense's stance in this case . . . and we conclude that the decision does not take into account the reality that was created throughout the years regarding issuance of permits for participation in the joint ceremony and the legitimate expectations that were naturally formed among the joint ceremony organizers following the previous policy. We also found that, when executing his discretion, the Minister of Defense completely disregarded the considerations which relate to the feelings of the bereaved families who wish to conduct the ceremony in the planned manner, by Israelis and Palestinians jointly. Also absent from the Minister of Defense's considerations are the feelings of the segment of Israeli society which supports the existence of the ceremony and identifies with its content and aims . . . .

The Minister of Defense's stance puts the entire weight on the bereaved families and the public which the joint ceremony hurts its feelings, while completely overlooking the feelings of the bereaved families and the public who wish to conduct the ceremony as it was conducted throughout the years. Hence, the Minister's decision is unbalanced and unreasonable to the extent that justifies our intervention.[175]

In a subsequent paragraph the Court wrote that the petitioners' ideology, even if in dispute, is reconciliatory and non-defying, and stressed the blessing embedded in a plurality of opinions and "the importance to allow each person the freedom to choose his own path out of a recognition that this is a vital and central element, which a democratic society in based on."[176]

The decision was handed down on the morning of April 17, 2018. At that very evening the ceremony took place, after the Palestinian participants were allowed in. According to media coverage, around 7000 people attended the ceremony, and several hundred protested against it nearby.

In this case, unlike in *Barnett*, the Palestinian petitioners[177] have yet to enter Israeli territory. Hence, they themselves could not have invoked a

175. *Id.*

176. *Id.*

177. I am analyzing this case by legal norms applied by Israeli courts. Hence, I overlook the political difficulty (some would say irony) of describing Palestinians as "outsiders" who need a permit to enter a territory once part of the land they or their ancestors used to inhabit. The Supreme Court of Israel did recently rule that Palestinians who had a permanent residence status (i.e. residents of East Jerusalem) should not be easily stripped of that status, as they are not mere immigrants, by rather natives, who were born in the area, and whose families inhabited the land for generations (HCJ 7803/06 *Abu Arfa v. Minister of Interior* (13.9.2017), Nevo Legal Database (by subscription, in Hebrew). However, this does not grant a right for a Palestinian from the OPT, who was never granted residency status in Israel, to enter the country. Under international

right to freedom of speech in Israel. However, the Israeli bereaved families and the Israeli public wishing to attend the ceremony do have a right to pursue a dialogue with them. Indeed, the mere standing of the bereaved Israeli families side by side with the bereaved Palestinian families, holding hands, mourning together, is highly expressive and political — even before a word is uttered. The mere standing together, in Israel, during Memorial Day, is an expressive conduct, a message. As the American Supreme Court ruled, in deciding whether a particular conduct possesses sufficient communicative elements to bring the First Amendment into play, the court should ask itself whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[178] In the Bereaved Families case the answers for both these questions is in the affirmative. Hence, the mere gathering of the families from both sides of the border deserves freedom of expression protection. Obviously, the verbal messages conveyed in previous ceremonies, and expected to be conveyed in the 2018 one as well — messages of co-existence and peace between Israelis and Palestinians — are also entitled to constitutional protection as political speech.

To justifiably curtail the Israeli citizens' freedom of speech, the Israeli authorities must have proven a compelling governmental interest that would outweigh it. The Minister's awkward "bad taste" argument is not even a legitimate interest, let alone "compelling" one. The argument regarding the fact that some, maybe most, Israeli bereaved families will be hurt and offended by the Israel-Palestinian gathering is also not a compelling interest, since — as the Court correctly observed — it prefers protecting the feelings of some bereaved families over the feelings and ideology of others. Moreover, according to Supreme Court precedents, only in the most extreme and exceptional cases could negative feelings such as insult, sadness or fury, however sincere, be considered a compelling interest, which overrides the right to freedom of speech.[179] Hence, from a legal point of view, this was an easy case, which the Court ruled correctly.

It should be noted, however, that while the Court indeed reached in this 2018 decision the correct outcome, it is doubtful if the case was decided on free speech grounds. The Court did mention, towards the end of its

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law of occupation, there is no right of the residents of the occupied territory to enter the territory of the occupier.

178. *Texas v. Johnson*, 491 U.S. 397 404 (1989). The case was cited by the Israeli District Court in CrimA 5035/09 *Nawi v. State of Israel* (14.4.2010), Nevo Legal Database (by subscription, in Hebrew).

179. *See, e.g.*, HCJ 316/03 *Mohammed Bakri et al v. Film Review Commission et al*, 58(1) PD 249, 283 (2003)

decision, the importance of plurality of ideas in a democratic regime. However, most of its reasoning revolved around the fact that the Minister of Defense did not give any weight to the feelings of the bereaved families who were part of the Israeli-Palestinian forum, hence giving disproportionate (as a matter of fact, absolute) weight to that of the other families. As such, it is "merely" a ruling of unreasonableness under administrative law. Violation of the petitioners' reliance interest, another ground in administrative rather than constitutional law, was also mentioned by the Court.

This might very well be the reason that in the following year the Minister of Defense (this time not Liberman, but rather Prime Minister himself, who acted as Minister of Defense simultaneously) decided *again* to ban the entry of the Palestinian bereaved families to the 2019 ceremony. The application for their entry was this time refused in a succinct sentence: "Hello. The application is denied since there is a closure on Memorial Day eve." A petition was again submitted to the High Court of Justice, which this time used a clear freedom of expression terminology and reasoning to accept the petition and order the Minister to issue entry permits to the Palestinian families. The Court rejected the Minister's argument that the decision was based on security reasons. Judge Amit wrote in his leading opinion: "There are ninety-nine ways for memorialization. There are ninety-nine ways to express grief. Here lies the core of freedom of expression, of personal autonomy, the one that grants each person the opportunity to wrote and to design his own life story as he sees fit[180]" Judge Barak-Erez added:

> This petition is not only about Israel's admission regime and the rules which apply to judicial review thereof, but rather about a question which bears clear aspects of protecting freedom of speech, on which strict standards apply. As far as the ceremony's organizers are concerned, the identity of the ceremony's participants is part of the message which they wish to convey. The decision which was made [by the Minister of Defense] has ramification on the conveyance of the message in an area which is at the core of freedom of speech protection – matters of disagreement in the public sphere. Hence, the respondents had to take this matter into account, but their response mentioned nothing of it. As judges, our role is to ensure that freedom of speech in the Israeli society, particularly in matters of dispute, is well kept.

To conclude, the 2019 decision, unlike the 2018 one, used unequivocal constitutional reasoning, which is called for in freedom of expression cases.

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180. HCJ 3052/19 Fighting for Pease Ltd. And The Parents Circle — *Families Forum (PCFF) v. Minister of Defense* 7 (May 6, 2019), Nevo Legal Database (by subscription, in Hebrew).

Specifically, Justice Barak Erez, in her concurring opinion, echoed the ruling of the U.S. District Court in the *American Arab Anti-Discrimination Committee* case,[181] and made clear, that even when the Israeli Government (there – the American Congress) exercises its power at the core of immigration regime (in the Israeli case – the power of non-admission; in the American case – the power of deportation), it must use it within constitutional boundaries, including the limit on freedom of speech violation.[182] Accordingly, the 2019 decision applied strict scrutiny and rigorous judicial review. After this second decision, it would be much harder for the Government to ignore the Court's precedent, and one could anticipate (and hope) that it would not attempt to hinder future alternative Memorial Day ceremonies as it attempted to in 2018 and 2019.

C. *The Anti-BDS Legislation*

For a decade at least, the Israeli Knesset and Government have sought ways to suppress the support of boycott against Israel, manifestations of which became more common around the world.[183] The first measure taken was the enactment of the Law for Prevention of Damage to the State of Israel through Boycott of 2011, also known as the Boycott Law.[184] The Boycott Law defines "a boycott against the State of Israel" as "deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage."[185] It further considers that knowingly publishing an item which carries a reasonable probability that it will lead to a boycott, is a civil wrong.[186] Article 3 of the Law also limits the participation in tenders of any person or organization who published a call for a boycott

181. *Supra* note 64.

182. *See Bosniak, supra* note 104 at 73.

183. The leading entity for the advancement of international boycott against Israel is the BDS (Boycott, Divestment and Sanctions) movement. BDS MOVEMENT, https://bdsmovement.net (last visited Oct. 31, 2018). While Israel's struggle against boycott initiatives is not confined to the BDS movement alone, the BDS movement has become the main target of criticism and anti-boycott struggle by Israeli politicians and media. Hence, I title the legislation discussed below "the anti-BDS Legislation."

184. Law for Prevention of Damage to the State of Israel through Boycott, 5771-2011, SH No. 2304 p. 972.

185. *Id.* at § 1.

186. *Id.* at § 2.

or is committed to take part in one,[187] while Article 4 withholds financial benefits from any person or organization that does so.[188]

Petitions to the Supreme Court against the Boycott Law were submitted, and litigated before an extended nine-judge panel, which was split on different issues relating to the law. The Court unanimously held that the purpose of the Boycott Law, to protect the citizens of Israel from economic, cultural or academic damages, is a legitimate purpose (i.e., that the struggle against boycott is a legitimate and compelling governmental interest). It further unanimously held that Section 2(c) of the Law, which originally allowed for the imposition of punitive damages, without the need to prove causation between the wrongful act (i.e. call for boycott) and actual damage, was a disproportionate and therefore an unconstitutional infringement of the right of freedom of speech and declared it void.[189] Judge Melcer, writing the principal majority opinion, held that "the unbridled 'punitive damages' regime created by Section 2(c) of the Law exceeded the confines of the 'proportionality zone,'" as the punitive damages carry "a 'chilling effect' on political expressions and lively social discourse."[190] It was also unanimously decided to deny the petitions in so far as they related to Sections 3 and 4 of the Law, due to lack of ripeness for adjudication, and allowed for future petition against them, if and when the Minister of Finance would take action under these Sections.

The majority opinion, supported by five Judges, denied the petitions relating to Sections 2(a) and 2(b) of the Law, which define the tortious wrongdoing, against the dissenting opinions, delivered by four judges. While all Judges agreed that the Boycott Law infringes freedom of speech, they diverged as to whether a call to boycott lies at the *core* of protected political speech, or somewhere closer to its margins,[191] and consequently

187. *Id.* at § 3.

188. *Id.* at § 4.

189. HCJ 5239/11 *Uri Avnery et al v. The Knesset et al.* (Apr. 15, 2015), Nevo Legal Database (by subscription, in Hebrew). All citations are taken from the English summary of the *Avnery* judgement, available at https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\11\390\052\k21&fileName=11052390.K21&type=4 [Hereinafter: *Avnery* English Summary of Judgment].

190. *Avnery* English Summary of Judgment, *supra* note 189, at 6.

191. According to Judge Melcer's opinion, although a call to a political boycott is a political speech, which usually enjoys the highest level of protection by the courts, it also deviates from the "pure" freedom of speech. *Avnery*, para. 30 (Judge Melcer). He also rejected the petitioners' claims that a call to boycott helps promote the marketplace of ideas, as it wishes to change the political status quo by coercion achieved by economic means, and not by adhering to reason, and as such, a democratic state aimed at promoting the marketplace of ideas will be more reluctant to protect boycotters' freedom of speech. *Id.* Deputy President Rubinstein concurred with Judge Melcer. *Id.* at

also on the constitutionality of transforming such a call into a civil wrong under the Boycott Law.

Some of the Judges recognized that at the heart of the petition was a hotly debated political controversy, which is the Israeli policy towards the West Bank, East Jerusalem and other territories in dispute, insinuated in the Boycott Law by the words "an area under its [Israel's] control." As judge Danziger noted, "the fate of the Area and the settlements located in it is a matter of profound political and public disagreement in Israel"[192] and as such, "those wishing to express their discontent with the government's policy regarding the Area and to call others to oppose that policy, are entitled to the full protection granted in our constitutional regime for political expression."[193] Hence, as a boycott of this kind addresses an internal Israeli political issue, it cannot be regarded as an expression of protest against the existence of the State of Israel per se. Other judges, including from the majority camp, agreed with the insight that the Boycott Law, by referring not only to boycotting a person or an entity qua Israeli but also for her or its ties to "an area" under Israel's control (i.e. settlements) touches upon the exposed nerves of Israeli politics.[194]

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para. D (Deputy President Rubinstein). Judge Amit also joined Judge Melcer by holding that calling to a boycott fails to promote other rationales of freedom of speech, which are the driving out of falsity and the discovery of truth and the enhancement of the democratic process. *Id.* at Para. 12, 21 (Judge Amit). Retired President Grunis and acting President Naor also concurred with Judge Melcer. *Id.* at para. 2 (Retired President Grunis), para. 3 (President Naor). Unlike the majority opinions, Judge Danziger, whom Judge Joubran joined, held that a call to a political boycott promotes the three underlying rationales of freedom of speech: promotion of the marketplace of ideas, the enhancement of the political discourse, and the expression of autonomy by the boycotter. *Id.* at para. 26 (Judge Danziger), para. 1 (Judge Joubran). Judge Vogelman also held that a call to boycott the Israeli settlements in the OPT is a clear political expression. *Id.* at para 2 (Judge Vogelman).

192. *Avnery* English Summary of Judgement, *supra* note 189, at 7.

193. *Id.*

194. Judge Hendel stressed that the Law, in itself, will lead courts into meddling with clear political policy. *Avnery*, para 9 (Judge Hendel). Deputy President Rubinstein, while recognizing that the expertise of the courts in matters of political policy is limited, also states that the State of Israel is facing boycotts caused by the BDS movement and that the Law sets to address this issue — and aims at protecting the interests of Israeli citizens who settled in the Area, backed by the support of the Israeli governments throughout the years. *Id.* at para. YA (Deputy President Rubinstein). Retired President Grunis also expressed concerns regarding the involvement of judges in political issues such as the Israeli control over the Area, and emphasized that the legislator may defend Israeli citizens' property and well-being by suppressing calls to boycotts. *Id.* at para. 4 (Retired President Grunis).

This led Judge Danziger to interpret, alongside Judge Joubran, Section 1 of the Boycott Law, which sets the definition for the application of the Law, to read that only a certain type of boycott crosses the threshold of the Law — a complete boycott against the State of Israel as such. Hence, ruled the two minority Judges, "a call to boycott an institution of the State or a call to boycott areas which are under the control of the State, unless accompanied by a call for an overall boycott of the State, shall not come within the ambit of the Law."[195] Judge Vogelman, dissenting separately, used the "blue pencil" technique to simply delete the words "or area under its control" from the Boycott Law.[196] Judge Hendel, in his own dissenting opinion, held that Section 2 should be annulled altogether. According to Judge Hendel, the Section ". . . does not pass the constitutionality test and 'privatization' of the opportunity to protect the public interest by putting it in the hands of the individual could create a significant chilling effect against political freedom of expression."[197]

The majority judges, however, were satisfied with striking down the punitive damages provision of the Boycott Law, and refused to declare the labeling of a call for boycott as a civil wrong, in and of itself, unconstitutional. Yet, it should be added, so far no civil suit was filed against anyone in Israel for perpetrating a tortious wrong under the Boycott Law. Striking down the provision, which originally enabled to sue a person for boycott support without the need to prove a nexus between such support and the suffering of actual damages, has no doubt maid such legal proceedings almost impossible to win.

Apart from stipulating that boycott calls constitute a civil wrong, the Israeli Government, in 2015, decided that the Ministry of Strategic Affairs would be in charge of fighting the delegitimization of Israel in general and the BDS movement in particular.[198] In August 2016, a joint team, headed by the Minister of Interior and the Minister of Strategic Affairs, examined the issue of refusing the admission of activists in the BDS movement into Israel.[199] In March 2017, the Knesset passed Amendment 28 to the Entry into Israel Law, which amended Article 2 of the law.[200] Following Amendment 28, Article 2(d) bars the issuance of a visa or a residency permit for

195. *Avnery* English Summary of Judgement, *supra* note 189, at 9.

196. *Avnery*, at para 9 (Judge Vogelman).

197. *Avnery* English Summary of Judgement, *supra* note 189, at 10.

198. Decision 511 of the 34th Government of Israel "Transferring of area of activity from the Prime Minister's Office to the Office of Strategic Affairs" (2.9.2015), https://www.gov.il/he/departments/policies/2015_dec511.

199. Criteria for the Prevention of Entry to Israel of BDS Activists, https://www.gov.il/he/Departments/Policies/bds_activits_criteria_for_entering_israel.

200. Entry into Israel Law, 5712-1952, SH No. 111, p. 354.

any foreigner who made a "public call for boycotting Israel," as defined in the Boycott Law, or is affiliated with an organization that did so.[201] It is important to note, that unlike in the Boycott Law, Amendment 28 does not set a probability of harm criterion. Article 2(e) provides that the Minister of Interior may issue a visa or a residency permit to a boycott supporter nonetheless "for special reasons", hence creating an interplay reminiscent of Sections 1182(a)(27) and Section 1182(a)(28) of the aforementioned and erstwhile, McCarran-Walter Act.[202]

Shortly thereafter, the Population and Immigration Authority published a list of criteria for the application of the Amendment.[203] It states that an organization which supports boycotts and promotes them in an active and ongoing manner, rather than merely criticize Israeli policy, would be regarded an organization which is publicly calling for the boycotting of Israel, within the meaning of Amendment 28. The list also states how to identify activists that affiliate with such organizations: serving as senior executives in the organization; central activists (i.e. those who actively, substantially, and consistently promote boycotts, either within the organization or independently); etc. Institutional actors, such as mayors,[204] who actively and consistently promote boycotts are also on the list of criteria.

Since the enactment of the Amendment, several scholars and human rights activists were denied entry into Israel.[205] It should be noted, however,

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201. *Id.* at § 2(d).

202. *Id.* at § 2(e).

203. Criteria for the Prevention of Entry to Israel of BDS Activists, *supra* note 199.

204. *See, e.g.*, Yanir Cozin, *Despite Ban, Pro-BDS Dublin Mayor Enters Israel after Name Gaffe*, JERUSALEM POST (Apr. 11, 2018), https://www.jpost.com/Arab-Israeli-Conflict/Senior-BDS-activist-entered-Israel-after-Ministry-misspelled-name-549451;Leyal Khalife, *French Mayor Denied Entry by Israeli Authorities Because He's a BDS Supporter*, STEPFEED (Apr. 20, 2018), https://stepfeed.com/french-mayor-denied-entry-by-israeli-authorities-because-he-s-a-bds-supporter-8856. Palestinian BDS National Committee (BNC), *Dozens of Spanish cities declaring themselves 'Free of Israeli Apartheid'*, BDSMOVEMENT (Sept. 8, 2016), https://bdsmovement.net/news/dozens-spanish-cities-declaring-themselves-free-israeli-apartheid.

205. In July 2017, only 4 months after the legislation, 5 BDS activists were prevented from boarding their flight from Washington, D.C. to Israel. Upon boarding the plane, the group was told that the Israeli government had ordered the airline not to let them aboard. See: *5 BDS Activists Prevented from Boarding Flight to Israel*, TIMES ISRAEL (July 25, 2017), https://www.timesofisrael.com/bds-activists-prevented-from-boarding-flight-to-israel/. In May 2018, Katherine Franke and Vincent Warren, two U.S. human rights activists (Franke being also a professor at Columbia Law School), were detained for 14 hours upon arrival to Ben-Gurion Airport and were flown back to New York afterwards. Israel accused the two, which were invited to lead a delegation of

that although it seems that Amendment 28 caused an inflation of ideological exclusions and deportations, similar actions were carried out prior to its enactment as well.[206] In these previous instances, the Minister of Interior simply invoked his general authority — embedded in Article 11 to the En-

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15 fellow human rights activists touring Israel and the West Bank, of being involved in the BDS movement. See: Dina Kraft, *Two Leading U.S. Human Rights Activists Refused Entry to Israel, One for BDS Ties*, HAARETZ (May 3, 2018), https://www.haaretz.com/israel-news/.premium-two-leading-u-s-human-rights-activists-deported-from-israel-1.6052515. In the beginning of July 2018, Ariel Gold, a Jewish pro-Palestinian activist and an affiliate of the NGO Code Pink, was barred from entering Israel. Gold, who came on a visa to take part in a Jewish studies program at the Hebrew University in Jerusalem, was deported after the Minister of Strategic Affairs requested the Minister of Interior to have her visa canceled. See: *Prominent Jewish BDS Activist Denied Entry to Israel*, TIMES ISRAEL (July 2, 2018), https://www.timesofisrael.com/prominent-jewish-bds-activist-denied-entry-to-israel/. A month later, Jewish-American journalist Peter Beinart was withheld at the airport, where he was questioned about his association with various Israeli NGOs and about his past participation in a demonstration in Hebron in support of Palestinians rights. See: Amir Tibon & Noa Landau, *Israel's Shin Bet Detains Peter Beinart at Ben-Gurion Airport Over Political Activity*, HAHRETZ (Aug. 13, 2018), https://www.haaretz.com/israel-news/.premium-beinart-i-was-detained-at-ben-gurion-airport-over-political-activity-1.6381149. Unlike the previous describe incidents, however, Beinart was finally allowed in. Israeli Prime Minister Netanyahu later responded that the Beinart withholding and questioning was "an administrative mistake". See: Amir Tibon & Noa Landau, Israel's Shin Bet Detains Peter Beinart at Ben-Gurion Airport Over Political Activity, HAHRETZ (Aug. 13, 2018), https://www.haaretz.com/israel-news/.premium-beinart-i-was-detained-at-ben-gurion-airport-over-political-activity-1.6381149. There might, of course, be other similar instances, unknown for lack of media coverage The Association for Civil Rights in Israel (ACRI) issued a letter to the Ministry of Justice, claiming that the airport detentions made by the Shin Bet are intimidating and having a chilling effect on the right to freedom of speech. Deputy Attorney General Dina Zilber responded by saying that the detentions are within the Shin Bet authority, but that the protocols for the execution of this authority will undergo "refresh," as "some Shin Bet and border officials behaved in ways that did not conform to the legal and policy restrictions." *Shin Bet Will no Longer Ask Would-Be Entrants to Israel about Their Politics*, TIMES ISRAEL (Setp. 28, 2018), https://www.timesofisrael.com/shin-bet-wont-ask-about-political-views-at-the-border-top-official-says/. For the full correspondence between ACRI and the DOJ, see *Detention of Activists in Airports*, ACRI (Jul. 31, 2018), https://law.acri.org.il/he/42741.

206. This was acknowledged by the State in its answer to the petitions mentioned above: Para 28 to State's answer to petition made in HCJ 3965/17 *Alon Harel (Prof.) et al. v. The Knesset et al.* (Feb. 2, 2018), Nevo Legal Database (by subscription, in Hebrew).

try into Israel Law — to revoke any visa or permit previously issued under the Law.[207]

Amendment 28 has already generated several legal proceedings regarding its constitutionality or the legality of its application. Two months after its enactment, a petition challenging its constitutionality was filed before the Supreme Court.[208] The petitioners, two professors from the Hebrew University of Jerusalem, claimed that the Amendment has an adverse effect on them as members of the Israeli academia, for their lack of ability to organize conferences and round tables without any certainty if the invited foreign speakers may enter Israel. As such, the Amendment violates their freedom of occupation, as well as their freedom of speech and that of other Israeli citizens, wishing to be exposed to criticism on Israel's policy.

The Supreme Court held one and only oral hearing of the petition. Judge Vogeleman stressed, alongside Judges Melcer and Barak-Erez, that given the ruling in *Mandel*, it is problematic for the petitioners, who referred to the case, to rely on it.[209] The judges advised the petitioners to withdraw their petition, whilst not barring the petitioners from re-submitting a revised petition. The petition was withdrawn, and then re-submitted.[210] However, the second petition was also dismissed following an oral

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207. For example, in 2008, Jewish American academic Norman Finkelstein was deported from Israel and banned from re-entry for 10 years, due to expression of solidarity with Hizbullah, a Lebanese Islamic militia: Toni O'Loughlin, *US Academic Deported and Banned for Criticising Israel*, GUARDIAN (May 26, 2008), https://www.theguardian.com/world/2008/may/26/israelandthepalestinians.usa. Two years later, the renowned scholar Professor Noam Chomsky was denied entry into Israel and the West Bank, after being invited to speak at Bir Zeit University in the West Bank. Chomsky claimed that the Ministry of Interior " . . . . apparently didn't like the fact that I was due to lecture at a Palestinian university and not in Israel." (Amira Hass, *Noam Chomsky Denied Entry into Israel and West Bank*, HAARETZ (May 16, 2010), https://www.haaretz.com/1.5121279.) In 2016, Israel refused to issue a visa for Isabel Phiri, an assistant general secretary with the World Council of Churches in Geneva, for her alleged activism in the BDS movement. File No. 3084-18 Court of Appeals of The Entry into Israel Law, 1952, *Phiri v. Population and Immigration Authority* (Oct. 17, 2018), Nevo Legal Database (by subscription, in Hebrew) (holding that a border service officer's decision to deny entry to Phiri, before the enactment of Amendment 28, due to concern that Phiri will illegally emigrate to Israel, was unreasonable and that the Population and Immigration Authority must provide explanations for its decision to exclude Phiri from Israel).

208. HCJ 3965/17 *Alon Harel (Prof.) et al. v. The Knesset et al.* (Feb. 2, 2018), Nevo Legal Database (by subscription, in Hebrew).

209. P. 3-4 to protocol of discussion held at Feb. 2, 2018 in HCJ 3965/17 Alon Harel (in Hebrew) (on file with author).

210. HCJ 5029/18 *Alon Harel (Prof.) et al. v. The Knesset et al.*

hearing, in which the judges were again unfavorable to the petition. No written reasoning was offered by the Court.

The Amendment was also litigated in concrete individual cases, in which the interpretation and application of it (rather than its constitutionality) were discussed.[211] The most important of which is that of Lara Al-

211. One of them is the case of Omar Shakir. On May 2018, the Minister of Interior refused to renew a one year B/1 working permit, previously given to Shakir, an American citizen working in Israel since 2017 on behalf of Humans Rights Watch (HRW). The decision followed extensive research done by the Ministry of Strategic Affairs regarding different statements made by Shakir, from the time he was a student in the United States (and was the co-President of "Students for Palestinian Human Rights," a Stanford student body that called for economic boycott of Israel) and up until the time he was working in Israel (during which he tried to attend a FIFA meeting in Bahrain, in order to put pressure, as he admitted in a tweet, to boycott Israeli soccer clubs operating from Israeli settlements in the OPT). (For the report of the Ministry of Strategic Affairs dated 12 July 2017, in Hebrew, see: https://www.hrw.org/sites/default/files/supporting_resources/ministry_strategic_affairs_dossier_hebrew.pdf). In March 2018 the Ministry of Strategic Affairs issued an updated report on Shakir, repeating most of the findings of the previous report with one major difference: it now acknowledged that since his arrival to Israel, Shakir made no public call to boycott Israel, albeit "he continues to encourage activity in this area [boycott on Israel] *indirectly* through expression in his Twitter account" (Section 4 to a report by the Ministry of Strategic Affairs and Public Diplomacy, dated 28 March 2018; annex B to the State's response of 21 June 2018 (copy with author)). Despite this difference, the recommendation of the Ministry of Strategic affairs, not to renew Shakir's visa, remained, as did the decision of the Minister of Interior. HRW and Shakir petitioned against the Minister of Interior to the Administrative Court of Jerusalem (File No. 36759-05-18 AdminA (Jer), *Human Rights Watch v. Minister of Interior* (Apr. 16, 2019), Nevo Legal Database (by subscription, in Hebrew). They argued, among other things that deporting an alien, or not allowing her in, because of her support of boycott is a disproportionate infringement on freedom of speech, and hence unconstitutional. The petition was denied. The Administrative Court ruled that Shakir, who refused to declare before the Court that he would not call for a boycott against Israel while he is in the Country (unlike Alqasm, who agreed to do so) failed to convince the Court that he neglected his past support of boycotting Israel. An appeal to the Supreme Court was denied (Admin. App. 2966/19 *Human Rights Watch v. Minister of Interior* (Nov. 5, 2019), Nevo Legal Database (by subscription, in Hebrew). The Supreme Court agreed with the lower Court's reasoning and refused to discuss the constitutionality of Amendment 28 for procedural reasons. The Court rejected Shakir's argument, that a call for boycott supported by a claim that Israeli activities in the occupies territories are violations on international law, is outside the ambit of Amendment 28. It further held, that Shakir lacked standing to raise an argument regarding the infringement of freedom of speech of Israelis resulting from his deportation. A request for rehearing in an extended panel was denied (F.H.Admin. 7697/19 *Human Rights Watch v. Minister of Interior* (Jan. 20, 2020), Nevo Legal Database (by subscription, in Hebrew).

qasem. The Israeli consulate in Miami issued Alqasem, a 22-year-old American citizen, a one-year student visa, after she was admitted to a Master's program in Human Rights and Transitional Justice at the Faculty of Law of the Hebrew University in Jerusalem. However, upon arrival to Ben Gurion airport, Alqasem was denied entry, based on Amendment 28, as the Ministry of Strategic Affairs found evidence that she was a member, and later on the president of "Students for Justice in Palestine" (SJP) while she was a college student in the University of Florida. The small union, consisting of less than ten students, was affiliated — so claimed the Ministry — with National Students for Justice in Palestine (NSJP), which is on the Ministry's "blacklist" as a supporter of boycotting Israel.

Alqasem appealed to the Appellate Immigration Tribunal[212] and argued that she was unaffiliated with SJP for over a year, and does not support boycotting of Israel any longer, hence willing to study in an Israeli university. She declared before the Tribunal that she would not engage in any boycott activities while in Israel. Her lawyers presented a letter from the Rector of the Hebrew University, supporting her appeal. In that letter, the University mainly introduced utilitarian concerns, such as that the entry ban would adversely affect the great effort of Israeli academia, with the support and funding of the Israeli government, to build international ties with other universities worldwide; and that the entry ban would serve as double-edge sword, as it would only fuel BDS rhetoric against Israel instead of portraying Israel as a "democratic, enlightened and egalitarian state." Despite all of this, the appeal was dismissed, based on the Tribunal's ruling that the Executive's decision was within the bounds of reasonableness.

Alqasem then appealed to the Tel Aviv Administrative Court. At that point, the Hebrew University requested, and was granted permission, to join the appeal. In its short submission, the University basically made the same arguments as its Rector did in his aforementioned letter. The Administrative Court rejected the appeal. It mentioned the notion of SEP and added that "there is a significant concern that the appellant would use her stay in Israel to promote pleas for boycotting Israel."[213] Regarding the Hebrew University's stand, the Court ruled that despite the importance to encourage student exchange programs and academic collaborations between Israeli universities and their counterparts abroad, endeavors that might indeed be

212. File No. 5604-18 Court of Appeals of The Entry into Israel Law (TA) *Alqasem v. Ministry of Interior* (Oct. 4, 2018), Nevo Legal Database (by subscription, in Hebrew).

213. File No. 11002-10-18 *AdminA (TA) Alqasem v. Ministry of Interior* (Oct. 12, 2018), at para. 15 Nevo Legal Database (by subscription, in Hebrew).

jeopardized by the decision to ban Alqasem's entry after she already obtained a student visa, the Executive's decision is within bounds of reasonableness.

A three judge panel of Supreme Court overturned the Administrative Court's decision, and allowed Alqasem into the country. At this point, for the first time, the Hebrew University introduced an argument which expressed the importance of the exchange of ideas with students such as Alqasem. It wrote in its submission:

> Respondent 2, as an institution of higher education of the front line, wishes to stress, that the university is a place of an exchange of ideas, earning and creating knowledge. It is a place which is not afraid of disagreements and celebrates plurality of voices. The University believes that academia grows and develops out of free exchange of ideas, listening, discourse and dialogue.[214]

Judge Hendel, who wrote the leading opinion and was joined by Judge Vogelman, stressed that Alqasem's lawyers never questioned the constitutionality of Amendment 28, a matter pending at the time before the Supreme Court. Hence, the decision dealt with the interpretation of Amendment 28 and its application on Alqasem, rather than its validity. He ruled, while relying on the concept of "defensive democracy" and quoting MKs deliberation during the Knesset legislation proceedings, that the Amendment's purpose is preventive rather than punitive. Hence, since Alqasem was not engaged in BDS activities for at least a year and a half, vowed not to advocate it while in Israel and is interested in joining an Israeli university (which is the opposite of boycotting Israeli academia) — the decision not to allow her in was not within the scope of Article 28, and was, furthermore, unreasonable.[215] He added that the decision is also incongruent with the MOI's own internal regulations, which provide that Amendment 28 would be invoked only against foreigners who advocate boycott against Israel in an "active, consistent and ongoing manner." While indicating in passing that one of the University's argument against the Executive's

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214. Respondent No. 2 Response in AdminA 7216/18 *Alqasem v. Immigration and Population Authority*, para. 11 (Oct. 16, 2018), (on file with author; author's translation) [hereinafter University Argument].

215. AdminA 7216/18 *Alqasem v. Immigration and Population Authority*, 15 (Oct. 18, 2018), Nevo Legal Database (by subscription, in Hebrew). It seems that the Court could not suffice itself by saying that the decision was given outside the scope of Amendment 28 and therefore without authority (ultra vires), as the State argued before the court that the Minister of Interior holds a broad *general* authority to refuse entry of non-Israelis, which Amendment 28 did not narrow down. Hence, the Court added that the decision was not only absent Amendment 28 authority, but also unreasonable.

decision was that "academically, there is much utility in diversity and multitude of ideas generated by inclusion of students of different cultural, linguistic and national background to the classrooms,"[216] Judge Hendel did not base his decision on free speech grounds. As a matter of fact he stressed, that "invalidating the [Minister of Interior's] current decision does not imply giving [Alqasem] a *carte blanche* — since, if she goes astray again and usurps her stay in Israel to promote boycott activity, the Minister would be able to revoke her license [to stay] at once and deport her from the country."[217]

Judge Baron agreed, in her concurring opinion, with the interpretive move of Judge Hendel, which excludes past BDS supporters, who repudiated from it, from the scope of Amendment 28. She is the only panel member, however, who also mentioned free speech concerns. She wrote:

> Freedom of speech is the livelihood of democracy. When a person's right to free speech is violated, due to Article 2(d) of the law, even if it is someone who is not an Israeli citizen or resident, an arrow also hits the heart of Israeli society as a democratic society. Freedom of speech is a condition for live and free marketplace of ideas and opinions, for public debate on significant matters and for the elucidation of stands and ideologies. In the context of the boycott phenomenon, freedom of speech violation inhibits the possibility to deal with ideas which we as a society wish to refute — and this, of course, is not what we wish for.[218]

She then goes on to say:

> As [Alqasem's] *acts* are not sufficient grounds for refusing her entry to Israel, the unavoidable impression is that revoking her visa is due to the *political opinions* she holds. If this is indeed the case, this is an extreme and dangerous step, which might lead to the dissolution of the pillars on which Israel's democracy stands.[219]

Following the Supreme Court ruling, Alqasem was released from her several weeks long immigration detention and was able to join her fellow students at the faculty of law of the Hebrew University.

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216. This argument concerning diversity among students is mentioned neither in the University's written submission to the Court, nor in the transcript of the oral hearing before the Court. It could have either been raised orally by the University's lawyer yet not transcribed, or is Judge's Hendel's own expansion of the University's written argument cited above. University submission, *supra* note 214.

217. *Id.* at para. 18.

218. *Alqasem*, at 17 (author's translation).

219. *Id.* at 18-19. (author's translation; emphasis in origin).

The Hebrew University's joining of the proceedings, I would argue, had a great potential to take the *Alqasem* case to the constitutional sphere where it belongs. Unfortunately, the University decided — maybe strategically — to emphasize utilitarian concerns such as keeping the prestige of Israeli academia and avoiding a scenario in which the denial of entry "backfires" and fuels anti-Israel activism. As observed above, only in its submission to the Supreme Court did the University, for the first time, argue that the denial of Alqasem's entry would be detrimental to the vigilant academic and political debate within Israel campuses.[220] Accordingly, the majority opinion of Judges Hendel and Vogelman hardly mentioned freedom of speech concerns. Like in the 2018 Bereaved Families case, they focused instead on interpretation based on the legislature's original intent, and administrative law concerns such as the agency's abidance by its own internal regulations.

Even Judge Baron, despite her attention to freedom of speech concerns, did not apply strict scrutiny while reviewing the decision to disallow Alqasem into the country. Just like her colleagues, she based her decision on grounds of unreasonableness of violation of internal regulations. She too, like her colleagues, clarified that Alqasem is not to break her promise not to advocate boycott while in Israel lest she would be justifiably deported.

As a result, while the *Alqasem* precedent is a positive development, in that it limits the government's power to invoke Amendment 28 to "preventive" purposes only, it does not provide the fullest possible protection to freedom of speech, as it could and should have. I will therefore offer an alternative interpretation of Article 28, which is in line with the *Avnery* case,[221] yet more protective of freedom of speech.

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220. Compare this seemingly hesitance to raise freedom of speech concerns by the Hebrew University with arguments raised by universities in *Mandel*, *supra* note 44 at 760 ("plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment.")

221. I disagree with the *Avnery* ruling, and support the minority opinion of Judge Hendel, according to which article 2 of the Boycott Law – which stipulates that a boycott against Israel constitutes a civil wrong – is an unconstitutional infringement on freedom of speech. Interestingly enough, two American District Courts ruled in this vein when they considered (in preliminary proceedings) Kansas and Arizona statutes, which required all persons who enter into a contract with these respective states to certify that they are not engaged in a boycott of Israel (*Koonts v. Watson*, 283 F. Supp. 3d. 1007 (2018); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (2018)). Despite my support of the minority opinion in *Avnery*, I take the majority opinion as a baseline for my interpretive thesis of Amendment 28. I do so for doctrinal-pragmatic reasons, as the chances that this expanded panel's ruling will be overturned or mitigated seem extremely low. This was evident in the Supreme Court decision in *Alqasem*, in which even

The *Avnery* case, no doubt, complicates any constitutional challenge of Amendment 28. As described above, the Court ruled there, that the Boycott Law's principal provision, which makes a calling for a boycott, of a person or entity due to their ties to Israel or an area within its control, a civil wrong, is constitutional. The difficulty then is, that if — as the Supreme Court ruled — a call for boycott, including boycott of businesses in the settlements, could be a legal wrong to be compensated for, how can Israelis argue that they want to exercise their right to engage in conversation with aliens who call for boycotting Israel or the settlements (i.e. perpetrate a legal wrong)? This difficulty is exacerbated as, according to the majority opinion in *Avnery*, a call for boycott is entitled to a limited protection as compared to other "regular" political expressions.

Nevertheless, the matter is more nuanced than that. The Boycott Law specifically dictates, that for a call for boycott to be compensable, there must be "a reasonable probability that the call would lead to boycott." Moreover, the Supreme Court struck down the punitive damages provision in the original law and ruled that an individual who called for boycott could be held accountable in civil law, only insofar as another individual incurred some real damage by that call. In other words, for a call for boycott to be a basis for compensation, not only the content of the call and the circumstances that surrounded it must be such as to make it reasonably probable that it would lead to a boycott, but an actual boycott has to occur, and actual damages must be incurred.

Amendment 28 does not include any of these elements. It simply states that a non-Israeli who publicly called for a boycott of Israel or the settlement (and — the *Alqasem* decision adds — did not repudiate it) or is affiliated with an organization that made such a call — is banned from entering Israel. The fact that the call was not materialized in any manner or that there is low probability that it would — is supposedly immaterial for the decision to allow that person in, regardless of the fact that some Israelis might wish to engage in a dialogue with her, for example. Could judicial interpretation insert such elements into Amendment 28? For the sake of freedom of speech, and let us recall, that all nine judges of the *Avnery* Court agreed that a call for boycott is a political speech entitled for protection, despite their ancillary differences on the scope of protection,[222] I believe it could, and should. Alternatively, these elements should be inserted by the Court, by using the "reading-in" technique. If my argumentation to employ these two legal methods (interpretation and reading in) fails, I will alternatively argue

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Judges Hendel and Vogelman, who dissented in *Avnery*, declined to reconsider the *Avnery* ruling.

222. *Supra* note 191.

that a refusal by the Minister to employ her article 2(e) waiver authority along the suggested lines should be deemed unlawful, for not giving the proper normative weight to freedom of speech considerations. If that proposition fails too, I will argue that Amendment 28 should be struck down as an unconstitutional violation of freedom of speech. Here is my explanation.

Take for example an alien, a professor of philosophy, who once publicly called to boycott products manufactured by Israeli factories located in the OPT, and still holds that position. She is invited to give a lecture in a symposium to be held by an Israeli institution on "the philosophical underpinnings of boycott." Philosophizing on boycott does not necessarily entail supporting boycott and is definitely not calling for boycott, and hence — none of the conference participants would necessarily be involved in perpetrating a wrong in torts, according to the Boycott Law. Or, to make things even simpler, let's assume that the professor is invited to give a lecture on Spinoza's philosophical heritage. The audience's wish to hear the lecture of the invited professor is undoubtedly protected under its members' right to free speech. Hence, Amendment 28 — which supposedly bars the entry of an alien simply because she publicly advocates boycotting Israel or the settlements, notwithstanding if she intends to make such a call upon entry to Israel, and the probability that such a call — even if she made it — would lead to actual boycott and damages — is *prima facie* unconstitutional, due to the Israeli "listeners" rights and possibly due to the prohibition on governmental "viewpoint discrimination."

A possible way to deal with this constitutional transgression is to interpret the words "a public call to boycott the State of Israel, as defined in the Law to Prevent Injury of the State of Israel by Boycott, 2011 [the Boycott Law]," as referring not only to the *definition* of "boycott of the State of Israel" in Section 1 of the Boycott Law, but also to the additional elements of the tortious wrong, stipulated in Section 2 of the Boycott law (reasonable probability to cause boycott).[223] By utilizing this interpretation, the infringe-

223. I find the elements of Section 2 of the Boycott Law are more relevant than the elements of Sections 3 and 4 of that law, dealing with withdrawal of economic benefits to persons or entities who support boycotting Israel, as Section 2 more directly deals with the constitutional right to free speech, and that is the matter of my attention in this article. Unlike Section 2, Section 3 and 4 of the Boycott Law don't mandate that a call for a boycott has to carry a reasonable probability to cause one for their execution. In *Avnery*, it was unanimously decided to deny the petitions in so far as they related to Sections 3 and 4 of the Law, due to lack of ripeness for adjudication, and allowed for future petition against them, pursuant to a concrete decision by the Minister of Finance. It is important to note that as the *Alqasem* Court held that Amendment 28 is not punitive in its nature but preventive, it should be inferred that it cannot be construed in accordance with Section 3 and 4 of the Boycott Law, which are clearly punitive.

ment of the freedom speech of Israeli "would-be listeners," who *bona fide* wish to listen to aliens who support a boycott on Israel or the settlements, is minimized.

If the Court, that might be asked in the future to adopt this interpretation would rule — against my opinion — that it does not have the power to reach this result by way of interpretation, then I think it would have to reach it by using the "reading in" technique, which it has used in the past.[224] This relatively modest reading-in would bring it to the bare minimum necessary to meet the level of proportionality that could justify infringement on freedom of speech, while taking the *Avnery* ruling — i.e. that preventing boycott against Israel or the settlements is a "compelling governmental interest" — as prevailing. The Israeli legislature decided, after all, in the Boycott Law (Amendment 28's "eldest brother" as per Judge Vogelman's labeling in *Alqasem*), that only a call for a boycott, that carried a reasonable probability for actual boycott to happen, could be considered a legal wrong. If this is the legal standard that the Court found fit for "talkers" who engage in boycott discourse, there is no reason why the same standard would not apply to "listeners" as well: an Israeli should be entitled to listen to a foreigner who once called for a boycott, and even to a foreigner still calling for boycott, as long as this call does not carry any reasonable probability for actual boycott. After all, even when the "compelling governmental interest" is national security, only near certainty to grave and substantial harm justifies, according to Israeli jurisprudence, impeding speech.[225] Surely, the "danger" of boycott cannot be considered more compelling than the danger of revealing classified military information.

Such an interpretation or, alternatively, "reading in" Amendment 28 is especially warranted, as banning a speaker from entering the country is a pervasive encroachment on freedom of speech of the Israeli *bona fide* listeners, in the form of "prior restraint." According to the long-standing Israeli jurisprudence[226] (reaffirmed in the *Avnery* case[227]), as well as

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224. The Supreme Court of Israel is yet to fully flesh out the "reading in" doctrine and the circumstances in which it would be inclined to use it; but it did implement it, and gave some general guidelines as to its scope in Israeli constitutional law. *See*: HCJ 8300/02 *Nasser et al v. The Israeli Government et al*, para. 57-60 of President (ret.) Bieinisch's opinion (May 22, 2012), Nevo Legal Database (by subscription, in Hebrew).

225. *See, e.g.*, HCJ 680/88 *Schnitzer v. The Chief Military Censor*, 42(4) PD 617 (1989).

226. CA 214/89 *Avnery v. Shapiro*, 43(3) 840 (1989).

227. Judge Melcer, in para. 56(b) acknowledged that a court could issue an injunction to prevent a future call for boycotting Israel or the settlements, if there is a suspicion that an individual is about to make such an expression, based on the Boycott Law.

American jurisprudence,[228] this is the most severe form of violation of free speech, and therefore could be deemed constitutional only in rare cases, in which the governmental interest in particularly compelling.

True, as the State responded in the principled petition against the Amendment,[229] it could be difficult and cumbersome for a border control clerk to assess whether a person who called for boycott of Israel or the settlements in the past will refrain from doing so in her upcoming visit to Israel — as she might promised — or if past, present or future boycott calls of that person would lead to actual boycott by anyone and how many. Hence, it is reasonable to argue that the primary burden to establish that this would not be the case, lies on the alien herself and the citizens wishing to hear her. However, an absolute refusal to allow a boycott advocate to enter Israel would be outside the scope of Amendment 28, and an unconstitutional violation of the right of freedom of speech.

Even if my suggested interpretation as well "reading-in" argument are both rejected, aliens, who are refused entry or continued stay based on Article 2(d), could invoke Article 2(e) of the Entry to Israel Law. This article, as mentioned above, authorizes the Minister of Interior to grant an alien a permission to enter Israel or sojourn in it, for special reasons, notwithstanding Article 2(d). The court could "inject" freedom of speech considerations while reviewing the Minister's exercise of discretion under Article 2(e), just as the American Court did while reviewing the Attorney General's refusal to grant a waiver under Section 1182(a)(28) of the McCarran-Walter Act, when it was still in force. I would, however, advise that the Israeli Supreme Court use, while reviewing a case in which the Minister refused to employ Article 2(e), and unlike its American counterpart, the ordinary standard of review in free speech cases, i.e. strict scrutiny. As Gerald Nueman wrote, in the American context:

> The notion that resident aliens can be deported for constitutionally protected speech is an atavism in American law. Only the perception of deportation as the withdrawal of a privilege isolated from constitutional values has enabled this practice to continue. . . the proper perception of deportation as subject to First Amendment side constraints requires that deportation grounds be evaluated by the nor-

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He noted, however, that this worry is farfetched, as Israeli Courts are particularly hesitant to issue injunctions on future expressions, based on Supreme Court jurisprudence on freedom of speech.

228. *See Near v. Minnesota*, 283 U.S. 697 (1931).

229. *See* Section 45 to the State's preliminary response in HCJ 3965/17, *supra* note 208, dated Oct. 11, 2017 (on file with author).

> mal constitutional standard, which will not permit deportation for speech for which the alien could not have been punished.[230]

The same is true of a refusal of entry, as long as an Israeli is raising her own right to engage in a conversation with the alien, who wishes to enter the country.

If all other suggested legal means fail, then Amendment 28 should be deemed unconstitutional. First, it is not even clear if the Amendment would survive a "rational basis" scrutiny.[231] Even if it did, it would not survive *strict* scrutiny. It is not convincing to argue that a predictably futile call for boycott is alarming enough to justify curtailing one's freedom to convey it, and another's freedom to listen to it.

The *Alqasem* ruling is not protective enough of freedom of expression, as it *conditions* an alien's entry to Israel, and her continued stay in it, on not calling for a boycott of Israel or its settlements whatsoever. My suggestion is more protective of freedom of speech, as it provides that even if Alqasem returns to vocally support boycott, and tries to convince others to do so, she would not be deported if there is no reasonable probability that her call would cause actual boycott. It is, indeed, ironical that freedom of speech protection would be given to a speech so long as it is not perceived by the decision-maker and the Court as persuasive or powerful enough, yet this is an unfortunate outcome caused by the *Avnery* ruling. The suggested legal analysis would at least somewhat expand the marketplace of ideas. This is a good in itself, and might also potentially enable gradual, down-the-road change.

CONCLUSION

In the era of globalization, information easily flows among countries. Persons could also potentially move across borders, by advanced transportation, with little difficulty and many of them actually do. While most of us could read about the opinions of people from other countries on the web, there is still a unique effect to face-to-face interactions. Banning a foreigner from entering a country because of her political opinion, or deporting her for that reason, might not only adversely affect the foreigner's opportunity to express herself, but also infringe on the citizens' right to be exposed to different political ideas. Hence, ideological exclusion of foreigners is not merely a matter of immigration policy. It is, first and foremost, a matter of

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230. NEUMAN, *supra* note 2, at 109.

231. One might argue that no rational basis exists, as the non-Israeli boycott supporter could continue advancing that cause while out of Israel.

constitutional law and human rights; and as such — should be subject to strict judicial scrutiny.

The history of ideological bans in U.S. immigration law should serve as a warning sign to Israeli policy-makers, judges and laypersons. It is not a coincidence that such bans were most broadly employed in the U.S. during the McCarthy era, when freedom of speech was most under attack. Israeli protectors of democracy should keep an open eye and do whatever they can to ensure that immigratory ideological bans would not lead to silencing critical or unpopular views, and the suppression of Israeli democracy itself.